Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

EDWARD D. JONES & CO., L.P. d/b/a
EDWARD JONES, AND PAUL HUSTED,

Petitioners,

v.

ALICE P. KLOSS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Montana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state court decision conditioning enforcement of an arbitration provision, but no other provision of a contract, on oral explanation of the consequences of the agreement to arbitrate is contrary to Section 2 of the Federal Arbitration Act (9 U.S.C. § 2), which makes arbitration agreements valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract.

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties are all listed in the caption of this case. There are no corporate parties.

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PETITION FOR A WRIT OF CERTIORARI

Edward D. Jones & Co., L.P. d/b/a Edward Jones and Paul Husted respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Montana in this case.

OPINIONS BELOW

The June 13, 2002 opinion of the Supreme Court of Montana is reported at 54 P.3d 1, and is reprinted in the appendix to this petition at App. 1-App. 37. The September 25, 2002 order of the Montana Supreme Court granting in part and denying in part the timely filed petition for rehearing is reported at 2000 MT 129A and is reprinted in the appendix to this petition at App. 67-App. 71. The January 9, 2001 order of the Montana Supreme Court staying appellate proceedings and remanding to the district court for supplemental findings of fact is not reported, but is reprinted in the appendix to this petition at App. 38-App. 41.

The written findings of fact, conclusions of law and order of the Montana Eighth Judicial District Court filed March 26, 2001 is not reported. It is reprinted in the appendix to this petition at App. 42-App. 51. The written findings of fact, conclusions of law and order of the Montana Eighth Judicial District Court filed June 12, 2000 is not reported. It is reprinted in the appendix to this petition at App. 52-App. 66.

JURISDICTION

The opinion of the Supreme Court of Montana was filed on June 13, 2002. Petitioners filed a timely petition for rehearing which was granted in part on September 25, 2002 to amend by interlineation paragraph 36 of the original opinion. The remainder of the petition for rehearing was denied. On December 4, 2002, Justice O'Connor signed an order extending the time for filing this petition for certiorari to and including January 23, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

This petition involves the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, § 2, cl. 2, Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2 ("FAA" or "the Act"), Section 7 of the Securities Exchange Act of 1934, 15 U.S.C. § 78g, and Regulation T, 12 C.F.R. § 220.1, *et seq.* (2001) ("Regulation T").

The Supremacy Clause states in pertinent part:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Laws of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding. U.S. Const. art. VI, § 2, cl. 2.

Section 2 of the FAA provides:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2.

Section 7 of the Securities Exchange Act and Regulation T are reprinted in relevant part in the appendix to this petition at App. 76-App. 77.

INTRODUCTION

This petition presents the question of whether Section 2 of the Federal Arbitration Act (9 U.S.C. § 2) prohibits states from creating law, via judicial opinion, that imposes an oral notice requirement on arbitration provisions, but not any other provisions in the contract, before the court will enforce the parties' agreement to arbitrate. In the decision below, the Montana Supreme Court invalidated the arbitration agreement between the parties because the proponent of arbitration failed to orally explain the consequences of the arbitration agreement to the party now contesting arbitration. Although no oral explanation of contract terms is required under Montana's general contract law, the Montana Supreme Court required such explanation in this case solely because the provision at

issue was an arbitration clause that precluded the signatory from having the dispute heard in a Montana court.

As this Court foreclosed the use of legislative avenues to avoid enforcement of arbitration agreements in cases such as *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (striking down statutory notice requirement applicable only to arbitration agreements) and *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 270 (1995) (state statute prohibiting enforcement of pre-dispute arbitration agreements pre-empted by the FAA), the Montana Supreme Court invoked its common law as a mechanism to accomplish that which the state legislature cannot: imposing heightened notice requirements solely on arbitration agreements. The Montana Supreme Court's refusal to enforce the parties' arbitration agreement based on its suspicion that arbitration is an unfair method of dispute resolution resurrects the old judicial hostility towards arbitration agreements that the Federal Arbitration Act was intended to reverse.

The Montana Supreme Court's willingness to resort to creating discriminatory law in order to invalidate the parties' arbitration agreement implicates a continuing trend of national importance. Just this term, this Court granted a petition for certiorari raising an issue that parallels the issue in this case. *Green Tree Fin. Corp. v. Bazzle*, No. 02-634 (cert. granted January 10, 2003). The issue raised in *Bazzle* is whether courts may utilize state law to impose class arbitration on an arbitration agreement silent on the issue. It relates significantly to the issue in this case because in both cases the state court refused to enforce the parties' arbitration agreement according to its terms based on equity concerns, *i.e.*, the arbitration agreement, in the court's view, did not provide

the same procedural safeguards available in court. Such judicial suspicion of the fairness of arbitration agreements and arbitration directly conflicts with the FAA.

STATEMENT OF THE CASE

Statutory Background

"In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). "The [FAA] was intended to reverse centuries of judicial hostility to arbitration agreements by placing arbitration agreements upon the same footing as other contracts." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987) (internal quotes and citations omitted); *accord Allied-Bruce Terminix*, 513 U.S. at 270; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n.14 (1985); *Southland*, 465 U.S. at 10.

A written arbitration provision in a contract evidencing a transaction involving commerce can be revoked only upon "grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added); *Southland*, 465 U.S. at 10. Thus, state laws, *whether judicial or legislative in origin*, apply to regulate arbitration agreements *if* they "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry v. Thomas*, 482 U.S. 483, 492 (1987); *accord Doctor's Assoc.*, 517 U.S. at 687. Courts may not refuse to enforce arbitration agreements based on principles of law

not applicable to the enforcement of contracts generally. *Doctor's Assoc.*, 517 U.S. at 687; *Perry*, 482 U.S. at 492; *Southland Corp.*, 465 U.S. at 10. Arbitration agreements may not be construed in a manner different than that which is used to construe nonarbitration agreements. *Perry*, 482 U.S. at 492.

"By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed upon the same footing as other contracts." *Doctor's Assoc.*, 517 U.S. at 687 (internal quotes omitted); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974). States may not "decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause . . . for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the Act's language and Congress' intent." *Allied-Bruce Terminix*, 513 U.S. at 281. Yet, that is precisely what the Supreme Court of Montana did in the decision below.

Factual Background

Petitioner Edward D. Jones & Co., L.P. d/b/a Edward Jones ("Edward Jones") is a limited partnership registered to do business as a securities broker-dealer in all fifty states and is a member of the National Association of Securities Dealers ("NASD") and the New York Stock Exchange ("NYSE"). Petitioner Paul Husted ("Husted") is, and at all relevant times was, an Edward Jones registered representative located at one of its branch offices in Great Falls, Montana. In 1985, Respondent Alice Kloss ("Kloss"), then approximately 80 years old, was referred to Husted

after she became disappointed with the services of her previous brokerage firm.

Kloss opened three full service accounts with Edward Jones between 1989 and 1998: one in 1989, one in 1992 and one in 1998. At the time she established each full service account, Kloss executed a full service agreement with Edward Jones, which was included within a master agreement entitled "Customer Account Agreements for Full Service and Customer Loan Accounts." By signing the full service agreements, Kloss agreed to arbitrate with Edward Jones "any controversy arising out of or relating to any of my accounts or transactions with you, your officers, directors, agents and/or employees for me, or to this agreement or the breach thereof." The arbitration clauses from the 1992 and 1998 agreements are reprinted in full in the appendix to this petition at App. 72-App. 73 and App. 74-App. 75, respectively.

The arbitration clause in the 1992 agreement is two paragraphs long and is located on the bottom third of the second page of the six-page agreement. The arbitration clause in the 1998 agreement contains the same two paragraphs in addition to a third paragraph pertaining to class actions. The three-paragraph clause covers roughly one-half of the second page of the six-page agreement. In both agreements, the arbitration clause is the only clause or section in the agreement printed entirely in bold-face type. Pet. App. at App. 46.

The district court found that before signing the 1992 and 1998 agreements, Kloss had the opportunity to read the agreements, but chose not to do so. Pet. App. at App. 46, App. 54-App. 55. The district court also found that Kloss would have understood the arbitration provisions if

she had read them. *Id.* Before Kloss executed each agreement, Husted explained what he considered to be the significant features of the agreement from an investment perspective. *Id.* Husted did not point out the arbitration provision, but the arbitration clause itself included five numbered sentences in the first paragraph that explained the effect of the provision. Pet. App. at App. 44, App. 46, App. 54-App. 55.

Both agreements contained a detachable signature card or page that was forwarded to Edward Jones' home office after Kloss signed the agreements. In 1992, Kloss signed the card while it was still attached to the document. In 1998, the signature page was detached by Edward Jones' employee, Donna Federer, and handed to Kloss for her signature. Both the 1992 and 1998 agreements contained a bold-faced statement immediately above the signature line notifying Kloss of the existence and placement of the arbitration clause in the agreement, and that by signing below the statement she acknowledged receiving a copy of the agreement.[1] In the 1992

[1] The 1992 notification and acknowledgment states in full: **THE FULL SERVICE ACCOUNT AND THE CUSTOMER LOAN ACCOUNT AGREEMENTS CONTAIN A PRE-DISPUTE ARBITRATION CLAUSE WHICH IS INCORPORATED BY REFERENCE FROM THE GENERAL ACCOUNT PROVISIONS ON PAGE TWO AT PARAGRAPH 12. BY MY SIGNATURE BELOW I ACKNOWLEDGE THAT I HAVE RECEIVED A COPY OF THIS DOCUMENT.** Pet App. at App. 45, App. 56. The language found in the 1998 agreement is identical, except the phrase **"which is incorporated by reference from the General Account provisions on page two at paragraph 12"** has been changed to read **"that is incorporated by reference from the general account provisions on pages 1 and 2,"** and the statement is printed in normal sentence case. Pet. App. at App. 47.

agreement, the notification and acknowledgement statement is located immediately above the perforated line that allowed the signature card to be detached. In the 1998 agreement, the notification and acknowledgment statement is located at the top of the signature page itself.

Procedural History

On December 28, 1998, Kloss filed suit in the Montana Eighth Judicial District Court, Cascade County, alleging a number of causes of action arising out of the establishment of a charitable remainder trust in May of 1998. On February 17, 1999, Edward Jones and Husted filed a motion to stay proceedings and compel arbitration pursuant to the arbitration provision contained in the 1992 full service agreement. After an evidentiary hearing, the district court (Judge Johnson) stayed the proceedings and ordered the parties to arbitrate. Pet. App. at App. 65. Kloss appealed to the Supreme Court of Montana.

On January 9, 2001, the Montana Supreme Court remanded the case to the district court for supplemental findings of fact and conclusions of law after Edward Jones located a microfiche copy of Kloss' signature page or card acknowledging receipt of the 1998 full service agreement. Pet. App. at App. 40-App. 41. In the district court, Edward Jones and Husted renewed their motion to compel arbitration based on both the 1992 and the 1998 full service agreements, and after an evidentiary hearing, the district court, now with Judge Macek presiding, once again ordered the parties to arbitrate. Pet App. at App. 51.

Kloss again appealed to the Supreme Court of Montana. Petitioners argued in their brief to the Supreme Court of Montana that the FAA and the Montana Uniform

Arbitration Act required enforcement of the arbitration provision at issue because general Montana contract law presumes that a capable party who signs an agreement has read the agreement and understands its terms. Resp. Br. at 24-27. The petitioners directed the Court's attention to the public policy favoring enforcement of arbitration agreements and to the consistent decisions by this Court that arbitration agreements are valid and enforceable waivers of legal rights subject only to the same defenses as other contracts. Resp. Br. at 24, 27.

On June 13, 2002, the Montana Supreme Court reversed the district court's orders compelling arbitration. Relying on the factual findings of the district court, the Montana Supreme Court found the arbitration clause to be an adhesion contract provision outside of Kloss' "reasonable expectations" because she did not read the provision and Husted did not explain it to her. Pet. App. at App. 14. The Court also found a fiduciary relationship between Husted and Kloss based on its interpretation of the "Liquidation of Collateral or Account" clause in the Customer Loan Agreement section of the full service agreement[2] as giving Husted discretionary trading authority in the account. Pet. App. at App. 17-App. 18. The Court concluded that

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[2] Kloss executed a master agreement entitled "Customer Account Agreements for Full Service and Customer Loan Accounts" in 1992 and 1998. The Liquidation Clause is a provision contained in the Customer Loan Agreement within the master agreement that gives Edward Jones discretion to liquidate a customer's securities for its own protection when the customer has exceeded margin requirements. The Customer Loan Agreement was a part of Kloss' 1998 agreement, but not the 1992 agreement. However, no evidence suggests that Kloss ever actually utilized the loan feature of her account. Pet. App. at App. 69-App. 71.

because of the fiduciary relationship, Husted "should have explained the arbitration clause" to Kloss. Pet. App. at App. 18. Although the Court couched its analysis in the terms of adhesion contract and fiduciary duty law, the Montana Supreme Court reached the same conclusion based on the same flawed analysis violative of the FAA – solely because an arbitration provision was at issue, the provision would not be enforced because Husted did not orally explain the consequences of the agreement to arbitrate.

The Court's requirement that one party to a contract explain the consequences of an arbitration provision to the other party marked a change in the law of adhesion contract and fiduciary duty law of Montana. Edward Jones and Husted filed a timely petition for rehearing pursuant to Rule 34 of the Montana Rules of Appellate Procedure.[3] The petitioners argued that the test outlined by the Montana Supreme Court for the enforceability of arbitration provisions is contrary to, and therefore pre-empted by, the FAA. Pet. for Reh'g. at 14-15. Citing this Court's decision in *Doctor's Associates*, 517 U.S. at 687, the petitioners argued that the Court's analysis directly conflicts with the FAA because it creates a test for the enforcement of arbitration agreements that does not apply to contracts generally. *Id.*

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[3] Montana Rules of Appellate Procedure, Rule 34 states in relevant part: "A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision *to which the attention of the court was not directed.*" M.R.App.P. 34 (emphasis added).

The Montana Supreme Court granted in part and denied in part the petition for rehearing. In granting the petition in part, the Court struck the year "1992" from paragraph 36 of the original opinion and substituted the year "1998." Pet. App. at App. 67-App. 68. The Court failed to address any of the other issues raised by the petitioners, including the contention that the Court's opinion is in direct conflict with the FAA and this Court's precedent.

REASONS FOR GRANTING THE PETITION

The Montana Supreme Court has placed arbitration agreements on unequal footing with other contracts by creating an oral notice requirement applicable only to arbitration agreements. This Court has previously stated, but not explicitly held, that courts may not rely on the unique qualities of arbitration agreements to invalidate such agreements under state common law "for this would enable the court to effect what . . . the state legislature cannot." *Doctor's Assoc.*, 517 U.S. at 687 n.3; *accord Perry*, 482 U.S. at 492 n.9. Clearly, *statutory* notice requirements not applicable to contracts generally conflict with and are pre-empted by the FAA. *Doctor's Assoc.*, 517 U.S. at 687. The decision below squarely presents the issue of whether a court, under the FAA, may refuse to enforce the terms of the parties' arbitration agreement based on a *judicially* created oral notice requirement because the court is of the opinion that the arbitration process is inferior to the court system.

The decision below raises issues of national importance because as this Court has foreclosed legislative

opportunities to hinder arbitration agreements, courts will resort to applying their common law in a discriminatory manner to continue their hostile treatment of arbitration agreements. States have disguised this hostility in different ways, but the issue remains the same: to what extent may a court that is skeptical of the arbitration process rely on public policy favoring access to judicial procedures to strike down otherwise valid arbitration agreements. Under the FAA, and established principles thereunder, they cannot.

I. THE DECISION OF THE SUPREME COURT OF MONTANA DIRECTLY CONFLICTS WITH SECTION 2 OF THE FEDERAL ARBITRATION ACT AND THIS COURT'S PRECEDENT THEREUNDER.

This Court has repeatedly warned against discriminatory treatment of arbitration agreements. *Doctor's Assoc.*, 517 U.S. at 687 n.3; *Allied-Bruce Terminix*, 513 U.S. at 270; *Perry*, 482 U.S. at 492. Nevertheless, the Montana Supreme Court has applied its common law in a discriminatory manner in order to invalidate the arbitration clause at issue in this case. The Montana Supreme Court created a new standard and rule of law solely applicable to arbitration provisions. This clearly conflicts with the FAA and the long-established principles thereunder.

The common law of Montana applicable to contracts generally is clear. Montana law follows the general principle that an individual cannot avoid contractual obligations based on ignorance of a contract term for failure to read the contract unless the other party is guilty of some deceit or false representation as to its contents. *Brown v. Merrill*

Lynch, Pierce, Fenner & Smith, Inc., 640 P.2d 453, 459-60 (Mont. 1982) (applying the general principle to enforce a liquidation of collateral clause in a margin agreement between a customer and securities broker-dealer). The fact that the contract is an adhesion contract does not alter this general rule because under Montana law, the terms of an adhesion contract are enforceable unless such provisions are not within the objectively reasonable expectations of the weaker party. *Shook v. State Farm Mut. Ins. Co.*, 872 F. Supp. 768, 773 (D.Mont. 1994); *Counterpoint, Inc. v. Essex Ins. Co.*, 967 P.2d 393, 395 (Mont. 1998); *Wellcome v. Home Ins. Co.*, 849 P.2d 190, 193 (Mont. 1993); *Transamerica Ins. Co. v. Royle*, 656 P.2d 820, 824 (Mont. 1983); *McAlear v. St. Paul Ins. Co.*, 493 P.2d 331, 335 (Mont. 1972). Where the written terms of an adhesion contract are not ambiguous, however, the doctrine of reasonable expectations does not apply, and the contract terms are enforced as written. *Counterpoint*, 967 P.2d at 395-96; *Stutzman*, 945 P.2d at 36; *Wellcome*, 849 P.2d at 194. Furthermore, the "reasonable expectations" standard, when applicable, is an objective one, and an expectation that is contrary to the unambiguous language of a contract term is not objectively reasonable. *Shook*, 872 F.Supp. at 775; *Counterpoint*, 967 P.2d at 396; *Wellcome*, 849 P.2d at 194; *Transamerica Ins. Co.*, 656 P.2d at 824.

The Montana Supreme Court below failed to apply these principles to the arbitration clause at issue. Instead, the Court created new rules because it was evaluating an arbitration clause and found the arbitration agreement unenforceable based on a subjective analysis of Kloss' *actual expectations*. Because Kloss did not read the contract (although she had the opportunity to do so) and Husted did not explain the arbitration provision to her, the Court concluded that the arbitration provision was not

within Kloss' "reasonable expectations." The Court failed to consider, as it would in other contractual contexts, whether any ambiguity existed in the language of the arbitration clause to determine whether the doctrine of reasonable expectations even applied. If the Court had analyzed the language of the arbitration clause, it would have found five numbered paragraphs printed entirely in bold-face type explaining the effect of the arbitration clause in clear and unambiguous language.[4] In addition, the Court made no mention of the general principle that, absent fraud or misrepresentation, a party executing a contract is presumed to have read the agreement and understand its terms. On the contrary, the Court focused on the finding that Husted did not explain the arbitration provision to Kloss. In effect, the Court shifted the burden of ensuring knowledge and comprehension of the arbitration provision to the proponent of the agreement, *i.e.*, the proponent must orally explain the consequences of the arbitration agreement to ensure enforcement.

The sole reason the Montana Supreme Court found the provision at issue to be outside of Kloss' reasonable expectations is because the Court was evaluating an arbitration provision. Based on the language of the opinion, it is clear that the Montana Supreme Court relied on the unique qualities of arbitration agreements in reaching its conclusion that the arbitration provision was not

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[4] The five numbered sentences contain the exact language of Rule IM-3110 of the NASD Conduct Rules, which requires members to include the identical five numbered sentences immediately preceding any pre-dispute arbitration clause in a customer account agreement. IM-3110(f), *NASD Conduct Rules*, NASD Manual (CCH) at 4892-93 (2001).

within Kloss' reasonable expectations and therefore, unenforceable. The Court explained that:

> the District Court's findings clearly establish that the arbitration provision by which Kloss waived her right of access to this State's courts, her right to a jury trial, her right to reasonable discovery, her right to findings of fact based on the evidence, and her right to enforce the law applicable to her case by way of appeal *were clearly not within Kloss' reasonable expectations*. Pet. App. at App. 14 (emphasis added).

The Court again explained the rights waived by Kloss through the arbitration provision three sentences later:

> However, [Husted] did not explain the arbitration provision (a provision by which Kloss waived at least two constitutional rights, i.e., a right of access to the courts pursuant to Article II, Section 16, and her right to a jury trial pursuant to Article II, Section 26 of the Montana Constitution) to Kloss. Pet. App. at App. 14.

There can be no doubt that the Court found the arbitration provision outside Kloss' reasonable expectations solely because the provision at issue was an arbitration clause which necessitated a waiver of the right to procedures available in the court system. Furthermore, admitting that it need not reach the issue of unconscionability, the Court nevertheless recites an eight-factor unconscionability test for future application to arbitration agreements.[5]

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[5] The Court instructs future litigants that the following eight factual issues should be developed in a proper record for determining unconscionability:

(Continued on following page)

Although not applicable to the instant case, the factors clearly evidence the Court's rationale in creating the new oral notice requirement for arbitration agreements. The concurring opinion of Justice Nelson, which was joined by all four justices of the majority, also demonstrates that the majority's analysis finds its support based on the fact that the clause at issue precluded Kloss from resolving her dispute in a Montana court. Pet. App. at App. 22-App. 37.

Montana's history of antagonistic treatment of arbitration agreements is also enlightening. Montana was one of the last states to adopt the Uniform Arbitration Act, and it did so only after this Court's decision in *Southland*. *See* Montana Senate Judiciary Comm. minutes at 6 (Jan. 21, 1985). Montana's hostility towards arbitration was also evident in the *Doctor's Associates* case previously before

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1. Are potential arbitrators disproportionately employed in one or the other party's field of business?
2. Do arbitrators tend to favor "repeat players" as opposed to workers or consumers who are unlikely to be involved in arbitration again? In other words, is there a tendency by arbitrators to avoid decisions which will result in the loss of future contracts for their services?
3. What are the filing fees for arbitration compared to the filing fees in Montana's district courts?
4. What are the arbitrators' fees? Do they make small claims prohibitive? Do they discriminate against consumers or workers of modest means?
5. Are arbitration proceedings shrouded in secrecy so as to conceal illegal, oppressive or wrongful business practices?
6. To what extent are arbitrators bound by the law?
7. To what extent are arbitrators bound by the facts?
8. What opportunity do claimants have to discover the facts necessary to prove a claim such as a company's business practices? Pet. App. at App. 15-App. 16.

this Court. When the petition for certiorari in that case first came before this Court, it was granted, vacated and remanded to the Montana Supreme Court for reconsideration in light of this Court's intervening decision in *Allied-Bruce Terminix Co.*, 513 U.S. at 281. *See Doctor's Assoc.*, 515 U.S. 1129. On remand, the Montana Supreme Court refused to allow the parties to brief the *Terminix* decision or hold oral argument and concluded that nothing in the *Terminix* decision related to the case. *Id.* at 686. After this Court reversed the Montana Supreme Court for the second time, two Montana Supreme Court justices dissented from the Montana Supreme Court's order remanding the case to the district court stating "We cannot in good conscience be an instrument of a policy which is as legally unfounded, socially detrimental and philosophically misguided as the United States Supreme Court's decision in this and other cases which interpret and apply the Federal Arbitration Act." *Casarotto v. Lombardi*, No. 93-488, *slip op.* at 3 (Mont. 1996).

Although couched in different language, the Court's fiduciary duty analysis suffers from the same fundamental flaw as its adhesion contract analysis. Ostensibly applying the law of fiduciary duty, the Court again relied on the unique attributes of arbitration agreements to create new rights and obligations pertaining to arbitration agreements. In forming the duty to "explain the consequences of the arbitration provision," the Montana Supreme Court again relied on the fact that Kloss waived her state constitutional rights to a jury trial and access to Montana courts through the arbitration clause concluding that "[i]n light of the substantial fiduciary obligations owed to his client, Husted should have explained the arbitration clause, a

clause which effectively waived the constitutional rights of a 95 year old widow . . . ." Pet. App. at App. 18.

The length to which the Montana Supreme Court was willing to go in order to strike down the arbitration clause is apparent from its reliance on the Liquidation Clause to find the discretionary authority necessary to establish a fiduciary relationship.[6] The Liquidation Clause describes the rights and obligations granted to a broker by Section 7 of the Securities Exchange Act of 1934, 15 U.S.C. § 78g, and Regulation T, 12 C.F.R. § 220.1 *et seq.* (2001), which were enacted to prevent the excessive use of margin (credit) to buy and hold securities. 15 U.S.C. § 78g; 12 C.F.R. § 220.1. A broker *must* liquidate an appropriate amount of securities when a customer fails to satisfy a margin deficiency within the appropriate time period. 12 C.F.R. § 220.4(d) (2001). Regulation T also expressly authorizes a firm that extends credit to a customer to impose additional requirements or take action for its own protection. 12 C.F.R. § 220.1(b)(2) (2001). Clearly, these federal regulations were not intended to expand the scope of a broker's fiduciary duties under state law.

The Montana Supreme Court recognized just that in *Brown*, 640 P.2d at 459-60, when the Court evaluated a contract provision virtually indistinguishable from the Liquidation Clause in the account agreement between

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[6] The Liquidation Clause in Kloss' agreement with Edward Jones states in pertinent part, "You may sell any or all property held in any of my accounts and cancel any open orders for the purchase or sale of any property without notice, in the event of my death or whenever in your discretion you consider it necessary for your protection." Pet. App. at App. 17.

Kloss and Edward Jones. In *Brown*, the customer held a margin account and, in connection with the opening of the account, signed an agreement containing a contractual provision that, similar to the Liquidation Clause in the instant case, gave the brokerage firm discretion to liquidate the customer's securities for its own protection.[7] *Id.* The brokerage firm in *Brown* even acted on that discretion in liquidating the customer's securities to cover a margin call. *Id.*

The customer in *Brown* argued that because he was unaware of the contract provision (because he did not read the contract), the brokerage firm should be held liable for liquidating his securities because the firm did not bring the contract provision specifically to his attention. *Id.* The Supreme Court of Montana emphatically disagreed, and rather than holding that the brokerage firm had an obligation to specifically point out the contract provision to the customer, it relied on the general rule that a customer cannot avoid his contractual obligations for failure to read the contract absent fraud or misrepresentation on the part of the broker. *Id.* Ironically, in the decision below the Montana Supreme Court used the Liquidation Clause, which a broker does not have a duty to orally explain

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[7] The clause at issue in *Brown* states in relevant part: "Merrill Lynch shall have the right, whenever in our discretion we consider it necessary for our protection . . . to see (sic) any or all securities and commodities in your account(s) with us (either individually or jointly with others) . . . and to close any and all outstanding contracts . . . and it being further understood that you shall at all times be liable for the payment of any debit balance owing in your account(s) with us upon demand and that you shall be liable for any deficiency remaining in any such account(s) in the event of the liquidation thereof in whole or in part by us or by you." *Brown*, 640 P.2d at 459.

under *Brown*, to find the fiduciary relationship that allowed it to impose a duty to orally explain arbitration agreements. In ostensibly applying the law of fiduciary duty, the Montana Supreme Court has in reality created unique requirements for arbitration agreements that do not apply to contracts generally. The oral notice requirement imposed, which is applicable only to arbitration agreements, runs afoul of the FAA by placing arbitration agreements on unequal footing with other contracts.

This rationale is consistent with a recent decision of the Supreme Court of Alabama which held that it would violate the FAA to apply principles of law not applicable under general contract law as a basis to strike down an arbitration clause. *Ex parte McNaughton*, 728 So. 2d 592, 598-99 (Ala. 1998). The court rejected *dicta* from the case of *Northcom, Ltd. v. James*, 694 So. 2d 1329, 1338 (Ala. 1997), that suggested arbitration agreements could be found unenforceable under a combination of the common law doctrines of unconscionability and mutuality of remedy. *McNaughton*, 728 So.2d at 597. The Alabama Supreme Court held that the doctrine of unconscionability/mutuality of remedy directly conflicted with the FAA because it introduced a "novel, if not revolutionary" doctrine of common law that directly depended on arbitration for its application. *Id.* at 598. (quoting *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007, 1014 (M. D. Ala. 1997)). The Court rejected the argument suggested in the *Northcom* opinion that the doctrine could apply equally in the non-arbitration context because the *Northcom* opinion relied on the uniqueness of arbitration agreements to support the doctrine: "The element of unconscionability in the context of an arbitration clause is supplied by the fact that, by agreeing to arbitrate, a party waives his right to a remedy by due

process of law . . . and his right of trial by jury." *McNaughton*, 728 So.2d at 598 (quoting *Northcom*, 694 So. 2d at 1338-39.) "At bottom, this approach assigns a suspect status to arbitration agreements. Doing so flies in the fact of *Doctor's Assoc.*, 517 U.S. at 687, where the Supreme Court of the United States explicitly stated that 'courts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions.'" *McNaughton,* 728 So.2d at 598-99.

Clearly, the Montana Supreme Court's view of arbitration and its concern that Kloss gave up the procedural protections provided in court controlled its application of state law. However, this is the very essence of arbitration agreements – the parties agree to "trade[ ] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Mitsubishi*, 473 U.S. at 628. The Montana Supreme Court relied on the uniqueness of arbitration agreements to fashion special standards of enforcement, which directly conflicts with this Court's pronouncements in *Perry*, 482 U.S. at 492 n.9, and *Doctor's Associates*, 517 U.S. at 687 n.3.

II. THIS CASE PROVIDES THE APPROPRIATE VEHICLE TO ADDRESS THE ISSUE RAISED BUT NOT DIRECTLY DECIDED IN *PERRY V. THOMAS* AND *DOCTOR'S ASSOCIATES V. CASAROTTO*.

This case presents an issue previously addressed only in the margins by this Court: to what extent may courts utilize principles of state common law to invalidate arbitration agreements. In *Perry*, 482 U.S. at 492, this Court held that a California labor statute giving employees the right to pursue an action to collect wages in court was

preempted by the FAA in cases where an employment contract required arbitration of all disputes related to termination of employment. This Court declined to reach the alternative contention by the respondent that the arbitration agreement was an unconscionable, unenforceable contract of adhesion because, although the respondent raised the issue in both the California Court of Appeals and this Court, the California Court of Appeals based its decision solely on the labor statute. *Id.* While the Court did not have the opportunity to specifically decide the issue of whether courts can deny arbitration through state common law principles, this Court did provide guidance noting that state-law defenses would apply to revoke an arbitration agreement only "*if* [the] law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* (emphasis original) This Court explained:

> A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.

Id. (internal cites omitted).

In *Doctor's Associates*, 517 U.S. at 687 n.3, counsel for Casarotto contended that "Montana could have invalidated the arbitration clause in the franchise agreement under general, informed consent principles . . . as [u]nexpected provisions in adhesion contracts must be conspicuous" under Montana law. This Court declined

to address the claim because the Montana Supreme Court had relied upon a specific statutory notice provision, rather than common law principles, to invalidate the arbitration agreement. *Id.* Nevertheless, this Court warned that "[i]t bears reiteration [ ] that a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" *Id.* (quoting *Perry*, 482 U.S. at 492 n.9).

Other courts have likewise noted, without holding, that states may not burden arbitration agreements with requirements not found in general state contract law. *See Sec. Indus. Assoc. v. Connolly*, 883 F.2d 1114, 1121 (1st Cir. 1989) ("[Under the FAA, courts] may not say (judicially, legislatively, or in a regulatory mode) that adhesion contracts are especially bad when arbitration is included, so we will therefore ban, or place gyves and shackles upon, only those adhesive contracts which contain arbitration clauses."); *Saturn Dist. Corp. v. Williams*, 905 F.2d 719, 722 (4th Cir. 1990) ("Because it has no general contract law restricting nonnegotiable provisions in standardized contracts, Virginia may not bar automobile manufacturers from making arbitration provisions a nonnegotiable term of doing business.").

This case squarely raises the issue addressed only in the margins in *Perry* and *Doctor's Associates*. The Montana Supreme Court refused to enforce the parties' arbitration agreement and, using its common law, imposed the requirement that Husted orally explain the arbitration agreement to Kloss as a condition to enforcement. No statutes directed to arbitration agreements were involved; the court solely relies on, or rather creates, common law

principles to effectuate its purpose of defeating the arbitration agreement. Thus, this case squarely presents the issue that previously has been addressed only in footnotes: whether the FAA preempts state court decisions that apply common law contract defenses differently to arbitration agreements based on the unique qualities of arbitration agreements.

III. THE DECISION BY THE SUPREME COURT OF MONTANA RAISES ISSUES OF NATIONAL IMPORTANCE.

The decision below has national importance because standardized arbitration agreements have become common in today's business and consumer relationships. Stephen J. Ware, *Arbitration and Unconscionability After Doctor's Associates, Inc. v. Casarotto*, 31 Wake Forest L. Rev. 1001, 1002 (1996). Arbitration clauses are routinely found in standard form agreements relating to subjects ranging from employment to medical care to financial institutions to pest control. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (employment contract); *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000) (agreement between consumer and financing company); *Doctor's Assoc.*, 517 U.S. at 681 (franchise agreement); *Allied-Bruce Terminix*, 513 U.S. at 270 (contract between pest control company and customer); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245 (2d Cir.), *cert. dismissed*, 50 U.S. 1267 (1991) (contract between member of foreign commodities exchange and American trader); *State ex rel Paine Webber, Inc. v. Voorhees*, 891 S.W.2d 126, 130 (Mo. banc 1995); (securities contract between broker and customer); *Buraczynski v. Eyring*, 919 S.W.2d 314 (Tenn. 1996) (contract between doctor and patient).

In the securities industry alone, arbitration plays a major role in the resolution of customer disputes. In 2000, there were 5,579 member firms in the NASD, NASD Statistics *at* http://www.nasdr.com/2380.asp (last updated 01/09/03), and 1,424 members in the New York Stock Exchange. NYSE 2000 Fact Book, *available at* http://www.nyse.com/pdfs/ 08_ EXCHANGE COMMUNITY.pdf (last visited 12/30/02). The dispute resolution arms of these two self-regulatory organizations received the bulk of all securities arbitrations filed in 2000. Out of 6,156 securities arbitration cases filed in 2000 with self-regulatory organizations, 5,558 were filed with the NASD and 553 were filed with the NYSE. Eleventh Report, Securities Industry Conference on Arbitration, at 106-126, July 2001, *available at* http://www.nyse.com/pdfs/SICA2001.pdf (last visited 12/30/02). Of the cases decided, 1,512 involved public customers and 789, or 52 percent, of the cases resulted in an award for the customer. *Id.*

The Montana Supreme Court's decision below raises other issues of national importance. By relying on the Liquidation Clause defining the broker's rights and obligations under Regulation T to find discretionary authority, the Court renders all margin accounts "discretionary." Under the Montana Supreme Court's reasoning, brokers now owe a duty to explain arbitration agreements to every customer who has a margin loan agreement with their brokerage firm. This is true regardless of whether the customer looks to the broker to utilize discretion to manage the account because by federal regulation, every broker has discretion to liquidate the customer's securities in a margin account for its own protection.

The opinion below exemplifies continuing judicial hostility in the highest courts of many states towards pre-dispute arbitration clauses. If allowed to stand, the decision will be a formidable obstacle to the federal policy of ensuring that arbitration agreements are placed on the same footing as other contracts. As this Court has foreclosed legislative avenues, state courts must resort to distortion of the common law to avoid enforcing otherwise valid arbitration agreements. *See e.g. Broemmer v. Abortion Services of Phoenix, Ltd.*, 840 P.2d 1013 (Ariz. 1992) (refusing to enforce an arbitration agreement between doctor and patient because the arbitration provision was contained within an adhesion contract and the doctor failed to explain the provision or bring it to the patient's attention). As state courts stretch to find grounds for invalidating arbitration agreements, the amount of litigation of the arbitrability issue increases exponentially, virtually eviscerating the very benefits of pre-dispute arbitration agreements. Arbitration was meant to benefit both consumers and businesses alike by providing a cost-effective alternative to the courts. *See Allied-Bruce Terminix*, 513 U.S. at 280. If allowed to stand, the decision directly conflicts with Congress' intention to equalize enforcement of arbitration agreements and contracts generally and elevates the potential for costly litigation antithetical to the certainty pre-dispute arbitration agreements were meant to produce.

IV. At Minimum, this Petition Should Be Held Pending the Court's Decision in *Green Tree Financial Corp. v. Bazzle.*

The issue presented in this case is directly related to the issue raised in *Green Tree Financial Corp. v. Bazzle*,

No. 02-634 (granted January 10, 2003): whether, under the FAA, courts may exercise discretion to require class arbitration in order to serve the interests of efficiency and equity when an arbitration agreement is silent on the issue. Pet. for Cert. at 23-26, *Bazzle,* No. 02-634 (filed October 23, 2002). The lower court in *Bazzle* held that "class-action procedures may be imposed [on arbitration agreements], in the court's discretion, if they further the court's notions of judicial efficiency and equity." Pet. for Cert. at 13, *Bazzle*, No. 02-634. However, the majority position on this issue holds that courts may not, under the FAA, impose class action procedures on a "silent" arbitration agreement because to do so would require a court to substitute its own notions of fairness in place of the explicit terms of the parties' agreement. Pet. for Cert. at 16, *Bazzle*, No. 02-634 (internal cites omitted).

In resolving the conflict presented in *Bazzle*, this Court will likely address a court's power, or lack thereof, to refuse enforcement of an arbitration agreement according to its terms if the court is of the opinion that efficiency and fairness so requires. In *Bazzle*, the lower court substituted its own notions of efficiency and fairness in imposing class action procedures on the parties' agreement regardless of the contractual intent of the parties. In the instant case, the Montana Supreme Court substituted its own notions of fairness in protecting Kloss' state constitutional rights to trial by jury and access to the courts at the expense of the parties' arbitration agreement. This Court's determination of a court's power to substitute its own notions of fairness for the parties' contractual intent will have a direct impact on this case. If this Court reverses *Bazzle*, its rationale will certainly require reversal of the decision below by the Montana Supreme Court. Thus, if this Court is not inclined

to grant the current petition based on the reasons set forth in the preceding sections, at minimum this Court should hold this petition until the resolution of *Bazzle*. Such course would be consistent with this Court's practice of holding a petition when a case already set for argument will likely address issues that are relevant to the pending petition. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 192-93 (7th ed. 1993). Therefore, if the Court does not find a need to fully review the decision below, it should at least hold this petition until the resolution of *Bazzle*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: January 23, 2003

**Counsel of Record*

No. 00-507

IN THE SUPREME COURT OF THE
STATE OF MONTANA

2002 MT 129

ALICE P. KLOSS,

Plaintiff and Appellant,

v.

EDWARD D. JONES & CO.,
a limited partnership, and
PAUL HUSTED,

Defendants and Respondents.

APPEAL FROM: District Court of the Eighth
Judicial District,
In and for the County of Cascade,
The Honorable Julie Macek,
Judge presiding.

COUNSEL OF RECORD:

For Appellant:

Joseph C. Engel, III, P.C., Attorney at Law,
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For Respondents:

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For Amicus (Montana Trial Lawyers Association):

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Submitted on Briefs: October 11, 2001
Decided: June 13, 2002

Filed:

/s/ [Illegible]
Clerk

Justice Terry N. Trieweiler delivered the Opinion of the Court.

¶ 1 The Appellant, Alice P. Kloss, opened financial services accounts with the Defendants, Edward D. Jones & Co. and Paul Husted, in 1992 and 1998. The agreement between Kloss and Jones contained pre-dispute arbitration clauses. After Kloss filed a complaint in the District Court for the Eighth Judicial District in Cascade County in which she sought damages caused by Husted's wrongful conduct, Jones filed a Motion to Compel Arbitration. The District Court granted the motion and Kloss appealed. While the appeal was pending, Jones located Kloss' 1998 brokerage agreement which was at issue in the District Court. This Court remanded this matter to the District Court for supplemental findings of fact and conclusions of law based on the 1998 account agreement. Following an evidentiary hearing, the District Court granted Jones' Motion to Compel Arbitration. Kloss now appeals from the order compelling arbitration. We reverse the order of the District Court.

¶ 2 Of the issues presented on appeal, we find the following to be dispositive:

¶ 3 1. Did the District Court err when it concluded that the arbitration clauses contained in the 1992 and 1998 Full Service Agreements were enforceable?

¶ 4 2. Did the District Court err when it failed to consider whether Defendants owed Kloss a fiduciary duty to explain the arbitration agreement?

¶ 5 3. Did the District Court err when it denied Kloss' motion for attorney's fees and costs?

FACTUAL BACKGROUND

¶ 6 The Appellant, Alice P. Kloss, is a 95 year old widow who was referred to Defendant Paul Husted in 1985. Husted has been employed by Defendant Edward D. Jones & Co. in Great Falls, Montana, as a stockbroker since 1981. Kloss opened a full service brokerage account with Jones on July 30, 1989, which permitted her to purchase securities and maintain a money market account.

¶ 7 Kloss established a living trust account with Jones in April of 1992. Like the 1989 account, the living trust account agreement contained a mandatory arbitration provision which required that "[a]ny controversy arising out of or relating to any of my accounts or transactions with you, your officers, directors, agents and or/employees . . . shall be settled by arbitration. . . ."

¶ 8 In early 1998, Kloss went to Husted's office to discuss investment options for a bond that had matured and Husted informed her that she had quite a bit of money and should set up a charitable trust with her bond proceeds. Husted then arranged for Kloss to meet with an attorney, who drafted the documents which created an irrevocable charitable trust.

¶ 9 On May 28, 1998, Kloss activated the charitable trust account by executing a Customer Account Agreement for Full Service and Customer Loan Accounts (hereinafter 1998 Agreement). The 1998 Agreement also contained a pre-dispute arbitration clause but was not signed by Kloss. Rather, Kloss signed a detachable signature card that

acknowledged she received a copy of the 1998 Agreement and incorporated the Agreement's arbitration clause by reference:

> The Full Service Account and the Customer Loan Account Agreements contain a pre-dispute arbitration clause that is incorporated by reference from the general account provisions on pages 1 and 2. By my signature below, I acknowledge that I have received a copy of this document.

The agreements themselves included the following explanations of rights waived by submission of disputes to arbitration:

> The 1992 "Customer Account Agreements for Full Service and Customer Loan Accounts – General Account Provisions" contains a section as follows:
>
> ARBITRATION
>
> 1. Arbitration is final and binding on the parties.
>
> 2. The parties are waiving their right to seek remedies in court, including the right to jury trial.
>
> 3. Pre-arbitration discovery is generally more limited than and different from court proceedings.
>
> 4. The arbitrators' awards is not required to include factual findings or legal reasoning, and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.
>
> 5. The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

¶ 10 After the charitable trust was executed, Husted selected and sold assets from Kloss' living trust to fund the charitable trust. The assets sold for approximately $352,000.00, which Husted deposited into a charitable remainder trust in the name of Alice P. Kloss.

¶ 11 In July 1998, Kloss began to have second thoughts about the charitable trust. She contacted her nephew and requested that he come to Montana, where she gave him power of attorney and decided to revoke the charitable trust. She then obtained counsel and filed a petition to revoke the charitable trust. After a hearing, Judge Kenneth Neill granted her petition.

¶ 12 Kloss then filed this complaint in the District Court for the Eighth Judicial District in Cascade County on December 28, 1998. Kloss alleged that Jones violated Montana statutes regarding the sale of securities, was negligent, committed unfair and deceptive business practices, breached its fiduciary obligations, and committed fraud. Kloss sought attorney fees, costs, expenses, and taxes incurred from the creation and revocation of the charitable trust. Jones filed a Motion to Compel Arbitration and Stay Proceedings on February 17, 1999. Evidentiary hearings were held on October 27, 1999, and February 1, 2000.

¶ 13 On June 12, 2000, the Honorable Marge Johnson entered an Order granting Jones' Motion to Compel Arbitration and Stay Proceedings, in spite of her finding that Kloss had not been provided with a copy of the 1992 Agreement. The 1998 Agreement was not discussed in Judge Johnson's decision.

¶ 14 On July 6, 2000, Kloss appealed to the Montana Supreme Court and filed her initial brief. During the

course of the appeal, however, Jones located the detached signature card that acknowledged Kloss' receipt of the 1998 Agreement. Jones requested that the appeal be stayed so that the District Court could make supplemental findings of fact and conclusions of law based on the 1998 Agreement rather than the 1992 Agreement which was the subject of Judge Johnson's Order.

¶ 15 On January 9, 2001, we remanded this case to the District Court for supplemental findings of fact and conclusions of law based on the 1998 Agreement. We additionally remanded Kloss' Motion for Attorney's Fees and Costs.

¶ 16 The District Court, the Honorable Julie Macek presiding, held an evidentiary hearing on March 20, 2001. On March 26, 2001, the District Court issued an order which granted the Defendant's Motion to Stay Proceedings and Compel Arbitration. On May 7, 2001, the District Court issued an order denying Kloss' Motion for Attorney's Fees and Costs. Kloss now appeals from these orders. We affirm in part and reverse in part the orders of the District Court.

DISCUSSION

ISSUE 1

¶ 17 Did the District Court err when it concluded that the arbitration clauses contained in the 1992 and 1998 Full Service Agreements were enforceable?

¶ 18 Both district judges concluded, based on slightly different reasoning, that the identical arbitration clauses found in the 1992 and 1998 contracts were binding and should be enforced. Before we can review the correctness

of those conclusions, it is necessary to set forth the findings made by each district judge. Those findings are not challenged on appeal and are, therefore, assumed to be the determinative facts on which our opinion is based. Judge Johnson made the following relevant findings:

> 7. The Full Service Agreement was drafted by Edward Jones, and printed on an Edward Jones form. The document at issue is a form dated 12/91.
>
> 8. Clients do not have any input on the contents of the agreement. It is presented to them as is for their signature and they must sign the agreement as is if they wish to open an account with the Defendants.
>
> 9. While there are certainly other investment brokers in Great Falls, no evidence was presented which would lead me to believe Mrs. Kloss had any meaningful choice in accepting or rejecting an arbitration provision of such a contract or that other stockbrokers offered contracts at that time for similar accounts which did not contain an arbitration provision. I have no reason to believe that was not a fairly standard practice at that time, and that she had no meaningful choice regarding acceptance of the agreement if she wished to open an investment account, which is what I do believe and find as a fact.
>
> 10. The arbitration provision is a unilateral provision of the brokerage houses contained in a contract presented to clients as is with no meaningful opportunity to negotiate its presence in the contract. . . . It is reasonable to assume that such contracts commonly contain such a provision

today, regardless of the brokerage house with which a client is dealing.

. . . .

12. Mrs. Kloss liked and trusted Mr. Husted and expected that he would explain to her anything she needed to know that was significant.

13. She did have an opportunity to read the agreement before she signed it, and was capable of doing so, but did not do so, relying instead upon Mr. Husted to advise her of the significant features of the agreement.

14. Mr. Husted, in opening accounts, such as that which Mrs. Kloss opened with him in 1992, explains what he believes to be the significant features from an investment perspective, ...

15. Mr. Husted did not consider the arbitration provision to be a significant provision of the contract.

. . . .

17. He [Husted] does not routinely explain and did not explain to Mrs. Kloss the arbitration provision of the contract.

18. She did not read and was not aware of the arbitration provision of the contract.

¶ 19 Judge Macek made the following findings which are relevant to our decision:

22. The Full Service Agreement [1998 Agreement] was drafted by and printed on an Edward D. Jones form.

23. Clients do not have input on the contents of said form. If clients wish to open a full service

account with Defendant they must sign the agreement.

24. Kloss had the opportunity to read the terms of the agreement before she signed it. Kloss did not do so.

25. Husted's normal procedure in opening accounts, which he followed with Kloss, is to explain what he believes to be the significant features of the account from an investment perspective, ...

26. Husted did not consider the arbitration provision to be a significant provision of the contract.

. . . .

28. Husted does not routinely explain the arbitration provision to clients and did not explain it to Kloss.

. . . .

36. Edward D. Jones & Co. is engaged in interstate commerce.

¶ 20 In spite of what she found to be the facts, Judge Johnson concluded, based on our decision in *Chor v. Piper, Jaffray & Hopwood, Inc.* (1993), 261 Mont. 143, 862 P.2d 26, that Jones had no obligation to explain to Kloss the terms of its contract with her and that even if the contract in question was a contract of adhesion, it was not unenforceable because it was not unconscionable based on the criteria set forth in *Iwen v. U.S. West Direct,* 1999 MT 63, 293 Mont. 512, 977 P.2d 989. Judge Johnson did not draw any conclusion or make any finding as to whether the arbitration provision was within Kloss' reasonable expectations.

¶ 21 Following her findings, Judge Macek concluded that Jones had no duty to explain the terms of the contract based on our decision in *Chor* and that Kloss is presumed to have read and understood the terms of the contract. Judge Macek also concluded that the agreements in question were not contracts of adhesion because Kloss could have done business with other brokerage houses (Macek made no finding to contradict Johnson's finding that the agreements at other brokerage houses would also have included an arbitration provision) and, finally, Judge Macek concluded that even if the agreements in question were contracts of adhesion, they were not unenforceable because they were within Kloss' reasonable expectations and were not unconscionable pursuant to our decision in *Iwen*. Judge Macek concluded that the arbitration provisions were within Kloss' reasonable expectations because they were included within the agreements.

¶ 22 On appeal, Kloss argues that the arbitration clause was part of a contract of adhesion and that waiver of her constitutional right to jury trial should not be presumed from signing a contract of adhesion. Jones contends that form contracts between securities brokers and their clients are not contracts of adhesion, nor are the arbitration clauses contained in such contracts unconscionable.

¶ 23 In *Iwen*, we were presented with the issue of whether an arbitration provision in an advertiser's yellow page directory agreement was enforceable and barred the advertiser's direct action in district court. We concluded first of all that a district court's order compelling arbitration is subject to *de novo* review. *Iwen*, ¶ 17 (*citing Zolezzi v. Dean Witter Reynolds, Inc.* (9th Cir. 1986), 789 F.2d 1447). We acknowledged that pursuant to the Federal Arbitration Act, found at 9 U.S.C. §§ 1-16 (1998), arbitration

provisions found in contracts affecting interstate commerce are valid "save upon such grounds as exist at law or in equity for the revocation of any contract." *See* 9 U.S.C. § 2 (1998) *and Iwen,* ¶ 23. We also noted that while generally applicable contract law defenses may be used to set aside arbitration agreements, states may not craft special rules which only apply to arbitration provisions for the purpose of defeating arbitration. *Iwen,* ¶ 26. Finally, we stated that a generally applicable contract law defense arises in contracts of adhesion which will not be enforced against the weaker party when it is: (1) not within the reasonable expectations of said party, or (2) within the reasonable expectations of the party, but, when considered in its context, is unduly oppressive, unconscionable or against public policy. *Iwen,* ¶ 27. We ultimately concluded that the arbitration provision at issue in *Iwen* was unconscionable because it lacked mutuality. In other words, U.S. West retained the right to proceed in district court while Iwen was precluded from doing so.

¶ 24 A contract of adhesion is a contract whose terms are dictated by one contracting party to another who has no voice in its formulation. Corbin on Contracts, § 1.4 at 13 (1993). The law pertaining to contracts of adhesion is not merely an academic exercise in which we engage to resolve contract disputes. It is a recognition of the reality that contracts do not always reflect terms that were bargained for at arms length. Instead, terms are sometimes dictated by one party to another who has no bargaining power and no realistic options. The law pertaining to contracts of adhesion recognizes that in certain circumstances, traditional assumptions associated with contract law are unfounded. However, determining that a contract is a contract of adhesion is not the end of the inquiry in Montana. In

Passage v. Prudential-Bache Securities, Inc. (1986), 223 Mont. 60, 727 P.2d 1298, we described contracts of adhesion in the securities context and the circumstances under which they are unenforceable.

> Contracts of adhesion arise when a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms. Here, the investor is faced with an industry wide practice of including Arbitration Clauses in standardized brokerage contracts. As the investor faces the possibility of being excluded from the securities market unless he accepts a contract with such an agreement to arbitrate, such clauses come within the adhesion doctrine. However, mere inequality in bargaining power does not render a contract unenforceable, nor are all standardized contracts unenforceable. As a consequence of current commercial realities, form forum clauses will control, absent a strong showing it should be set aside. For such a contract or clause to be void, it must fall within judicially imposed limits of enforcement. It will not be enforced against the weaker party when it is: (1) not within the reasonable expectations of said party or (2) within the reasonable expectations of the party, but, when considered in its context, is unduly oppressive, unconscionable, or against public policy. [Citations omitted.]

Passage, 223 Mont. at 66, 727 P.2d at 1301-02 (*quoting Finkle and Ross v. A.G. Becker Paribas, Inc.* (D.C.N.Y. 1985), 622 F.Supp. 1505, 1511-12).

¶ 25 We enforced the arbitration agreements in *Passage* because there was no evidence that they were not within

the parties' reasonable expectation nor was there evidence that they were unconscionable.

¶ 26 In *Chor,* we were again called on to decide whether arbitration provisions in securities agreements were contracts of adhesion and, if so, whether the arbitration clause is unconscionable. We concluded that the arbitration agreement was not a contract of adhesion because the consumer had testified that she had brokerage agreements with other firms which did not require her to arbitrate future disputes. We also held that the arbitration provision was clearly within Chor's reasonable expectations based on her own testimony that she understood her obligation to arbitrate based on her review of the agreement. Finally, we concluded that the broker in that case had no obligation to explain the effect of the arbitration clause because a fiduciary duty had not been established. We held that:

> In the absence of discretionary authority by a stockbroker to buy and sell in a customer's account, no fiduciary relationship is created in a broker-customer relationship. *Caravan Mobile Home Sales v. Lehman Bros. Kuhn Loeb* (9th Cir. 1985), 769 F.2d 561, 567.

Chor, 261 Mont. at 153, 862 P.2d at 32.

¶ 27 We conclude that both *Passage* and *Chor* are distinguishable, based on their facts, from this case. First, based on Judge Johnson's findings which are neither appealed nor contradicted by Judge Macek's findings, Kloss' agreements with Jones are clearly contracts of adhesion. They were standardized forms prepared by Jones and presented to Kloss who had no opportunity to negotiate the terms of the contracts if she chose to invest through Jones. Furthermore,

the arbitration clause was found by Judge Johnson to be an industry-wide practice. Kloss would have been excluded from the securities market unless she accepted the agreement to arbitrate.

¶ 28 Furthermore, unlike the facts in *Passage* and *Chor,* the District Court's findings clearly establish that the arbitration provision by which Kloss waived her right of access to this State's courts, her right to a jury trial, her right to reasonable discovery, her right to findings of fact based on the evidence, and her right to enforce the law applicable to her case by way of appeal were clearly not within Kloss' reasonable expectations. Kloss relied on Husted to explain to her anything in the contract that was significant. Husted, in fact, admitted that his normal practice when opening accounts was to explain significant features of the account to the investor. However, he did not explain the arbitration provision (a provision by which Kloss waived at least two constitutional rights, i.e., a right of access to the courts pursuant to Article II, Section 16, and her right to a jury trial pursuant to Article II, Section 26 of the Montana Constitution) to Kloss. Finally, based on the routine practice between the parties, Kloss did not read the contract and was not aware of the arbitration provision in the contract.

¶ 29 Judge Macek's conclusion that the arbitration provision was within Kloss' reasonable expectation simply because it was contained in the contract that she signed would defeat the protections provided by principles of law pertaining to contracts of adhesion. If the only question was whether the written terms of a contract included the challenged provision, reasonable expectations would never become an issue. Contracts of adhesion would always be enforced based on their plain language without regard to

what the consumer knew or understood. However, that is not the law pertaining to contracts of adhesion as previously set forth in our prior decisions which apply to any contract.

¶ 30 We have also been asked to conclude on appeal that the arbitration provisions found in Kloss' agreements with Jones are unconscionable. However, having concluded that the agreements were not within Jones' reasonable expectations, we need not reach the issue of conscionability. Furthermore, as a guide to future litigants who raise the issue of conscionability in the context of arbitration provisions, we take this opportunity to state that that issue cannot be decided without a more fully developed record. We have set forth the factors to be considered in *Iwen,* however, a number of factual issues should be addressed before those factors can be appropriately applied. For example:

1. Are potential arbitrators disproportionately employed in one or the other party's field of business?

2. Do arbitrators tend to favor "repeat players" as opposed to workers or consumers who are unlikely to be involved in arbitration again? In other words, is there a tendency by arbitrators to avoid decisions which will result in the loss of future contracts for their services?

3. What are the filing fees for arbitration compared to the filing fees in Montana's district courts?

4. What are arbitrators' fees? Do they make small claims prohibitive? Do they discriminate against consumers or workers of modest means?

5. Are arbitration proceedings shrouded in secrecy so as to conceal illegal, oppressive or wrongful business practices?

6. To what extent are arbitrators bound by the law?

7. To what extent are arbitrators bound by the facts?

8. What opportunity do claimants have to discover the facts necessary to prove a claim such as a company's business practices?

¶ 31 These are all issues which we consider relevant to the ultimate issue of whether an arbitration provision in a contract of adhesion is oppressive or unconscionable. Therefore, we would advise future claimants not to come to this Court with claims of oppression or unconscionability unless the record in regard to these issues has been adequately developed.

¶ 32 For these reasons we conclude, based on generally applicable contract law defenses, that the District Court erred when it concluded that the arbitration clauses contained in the 1992 and 1998 Full Service agreements were enforceable.

ISSUE 2

¶ 33 Did the District Court err when it failed to consider whether Defendants owed Kloss a fiduciary duty to explain the arbitration agreement?

¶ 34 Kloss contends that the District Court erred when it found that the parties were dealing at arms length and that the Defendants consequently had no obligation to explain the arbitration provision. According to Kloss,

Husted had a fiduciary relationship with Kloss because he had the discretion to trade securities in her account. The Defendants argue that Husted did not have the discretion to trade in Kloss' account and that Kloss misreads the provision which she claims gave Husted discretionary authority.

¶ 35 Whether Kloss and Husted, as broker and client, enjoyed a fiduciary relationship is highly fact intensive. "The question is not whether there is a fiduciary duty, which there is in every broker-customer relationship; rather, it is the scope or extent of the fiduciary obligation, which depends on the facts of the case." *Duffy v. Cavalier* (1989), 215 Cal. App. 3d 1517, 1535, 264 Cal.Rptr. 740, 752. In *Chor,* we held that although § 30-10-301(1), MCA, may create an implied code of conduct for brokers, a violation of which may constitute a breach of the duty the broker owes to a client, that duty is not necessarily fiduciary in nature. "In the absence of discretionary authority by a stockbroker to buy and sell in a customer's account, no fiduciary relationship is created in a broker-customer relationship." *Chor,* 261 Mont. at 153, 862 P.2d at 32. Therefore, pursuant to our analysis in *Chor,* a fiduciary relationship is created whenever a broker has discretion to buy and sell in the client's account.

¶ 36 Here, Jones and Husted had discretion to buy and sell securities in Kloss' account pursuant to the 1998 Agreement. Specifically, the "Liquidation of Collateral or Account" section of the Agreement states:

> You may sell any or all property held in any of my accounts and cancel any open orders for the purchase or sale of any property without notice, in the event of my death or whenever in your discretion you consider it necessary for your protection.

Furthermore, Kloss testified that Husted exercised that discretion when he selected and sold securities from her account to fund the newly created charitable trust without consulting her regarding which securities to sell.

¶ 37 Therefore, based on the plain language of the Agreement and Husted's selection and sale of securities in Kloss' account, we conclude that Kloss and Husted had a fiduciary relationship. In the words of Chief Judge Cardozo of the Court of Appeals of New York, a fiduciary duty is "the duty of the finest loyalty" and encompasses "[n]ot honesty alone, but the punctilio of an honor the most sensitive." *Meinhard v. Salmon* (1928), 249 N.Y. 458, 463-64, 164 N.E. 545, 546. In light of the substantial fiduciary obligations owed to his client, Husted should have explained the arbitration clause, a clause which effectively waived the constitutional rights of a 95 year old widow with no bargaining power and a relative lack of sophistication in such matters. However, as the District Court found, Husted did not consider the arbitration provision to be a significant provision of the contract and therefore did not explain the arbitration provision to Kloss. The irony of the Defendants' position is not lost on this Court, as the supposedly insignificant arbitration provision they now seek to enforce to the detriment of Kloss' constitutionally protected rights of access to court and trial by jury is now squarely at the center of this appeal.

¶ 38 We hold that Husted owed Kloss a fiduciary duty which included explaining the consequences of the arbitration provision Jones now seeks to enforce. Accordingly, we conclude that the District Court erred when it failed to consider whether a fiduciary duty existed.

ISSUE 3

¶ 39 Did the District Court err when it denied Kloss' motion for attorney's fees and costs?

¶ 40 Kloss contends that the District Court erred when it denied the claim for the opportunity to conduct discovery in an effort to prove that Kloss was entitled to attorney fees based on Jones' untimely disclosure of the detachable signature card. That issue was remanded to the District Court, which according to Kloss, should have made the determination of whether she was entitled to attorney fees.

¶ 41 Jones responds that the District Court did not err when it denied discovery on the attorney fee issue after reading the entire file, including prior transcripts and court orders. Jones contends that the District Court had the discretion to conclude that further evidence of the issue of attorney fees was unnecessary.

¶ 42 Attorney fees and costs may be awarded when:

> An attorney or party to any court proceeding who, in the determination of the court, multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct.

§ 37-61-421, MCA.

¶ 43 In its May 7, 2001, Order, the District Court found that the Defendants did not unreasonably or vexatiously multiply the proceedings. After reviewing the record, we conclude that the District Court's finding was not clearly

erroneous. Consequently, we affirm the District Court's order denying the motion for attorney fees and costs.

¶ 44 This case is remanded to the District Court for further proceedings consistent with this opinion.

/s/ Terry Trieweiler
Justice

We Concur:

/s/ Patricia Cotter

/s/ James C. Nelson

/s/ W. William Leaphart

Justices

Justice W. William Leaphart specially concurring.

¶ 45 I concur in the decision of the Court. I write separately to point out an additional fact that I find significant in determining whether or not the waivers inherent in the arbitration agreement were within Alice Kloss's reasonable expectations.

¶ 46 The Court notes that the 1998 Agreement contained a pre-dispute arbitration clause which was not signed by Kloss. Rather, Kloss signed a detachable signature card that acknowledged she received a copy of the 1998 Agreement and incorporated the Agreement's arbitration clause by reference. I would also add that the record indicates that the detachable signature card was signed by Kloss before she was ever provided a copy of the Agreement. The branch office administrator, Donna Ferderer, testified that she filled out the Jones account number, wrote Kloss's

social security number on the form, wrote the type of registration of the account, and tore the detachable card out of the brochure. Ferderer testified that, "I gave it to Alice and told Alice I need her signature right here. And for her to please indicate her capacity." Ferderer then took the form back, gave Kloss the disclosure statement, advised her that "these are the terms and conditions of opening up an Edward D. Jones account, keep these for your records. We retain this copy for our home office."

¶ 47 Although the detachable signature card states that the Agreement "contains a pre-dispute arbitration clause," it does not advise Kloss that in submitting to arbitration she waives her right to access to the courts, her right to jury trial, her right to reasonable discovery, her right to findings of fact based on the evidence and her right to enforce the law applicable to her case by way of appeal. Unless, in advance of executing the signature card, Kloss was advised of the fact that an agreement to arbitrate effectively waived the above rights, it cannot be said that such waivers were within her reasonable expectations when she signed. Reasonable expectations are, by their very nature, prospective; they are defined *before* one enters into a contract, not after. Thus the terms and conditions governing the account should have been provided to or explained to Kloss before having her execute the signature card. Recognizing the routine practice between the parties, the Court notes that Kloss did not read the contract. However, even if she had read the Agreement, it would not have made any difference since it was not handed to her until after she signed the detachable card.

/s/ W. William Leaphart
Justice

Justice Jim Rice joins in the concurring opinion of Justice Leaphart.

/s/ Jim Rice
Justice

Justice James C. Nelson specially concurs.

¶ 48 I concur in our Opinion. However, as mentioned briefly at ¶¶ 21, 27 and 36 of our Opinion and at ¶ 47 of Justice Leaphart's concurrence, there is an additional rationale supporting our decision in this case – i.e., whether Kloss effectively waived her rights to a trial by jury and to access to the courts[1] by executing Jones's 1992 and 1998 standard-form contracts. As far as I can determine, this is an issue of first impression in Montana.[2] It is my intention to develop this rationale further.

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[1] I have limited my analysis and discussion to these two constitutional rights because these are the two raised in this case. In saying that, I recognize, however, that other constitutional rights may be implicated in these sorts of cases, including the right to due process of law (Article II, Section 17, Montana Constitution) and equal protection of the laws (Article II, Section 4, Montana Constitution). Moreover, as our Opinion points out, arbitration results in the loss of certain procedural rights such as the right to engage in discovery and the right to have the admissibility of evidence judged under the Montana Rules of Evidence. Additionally, the right to judicial review of arbitration decisions is severely restricted – i.e. effectively there is no right of appeal from these decisions.

[2] Jones relies on *Passage v. Prudential-Bache Sec., Inc.* (1986), 223 Mont. 60, 727 P.2d 1298; *Larsen v. Opie* (1989), 237 Mont. 108, 771 P.2d 977; *Kingston v. Ameritrade, Inc.*, 2000 MT 269, 302 Mont. 90, 12 P.3d 929; and *Southland v. Keating* (1984), 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1, in opposing Kloss's waiver argument. As to this Court's

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¶ 49 Certainly, any person has the right to enter into an agreement which includes an arbitration clause. Where the contract and the arbitration clause has been negotiated at arm's-length between parties of equivalent sophistication and bargaining power, then there is no reason why such parties cannot also agree to settle disputes arising under the agreement, outside the judicial process. If these sorts of parties determine that it serves their mutual interests to waive their Montana constitutional rights of jury trial and access to the courts, then they have the right to do so.

¶ 50 The contrary is also true. Where parties are not of equivalent sophistication and bargaining power and where the agreement and the arbitration clause have not been negotiated for at arm's-length, then it is appropriate – indeed, imperative – that courts closely scrutinize any process and any contract which results in one party forfeiting basic constitutional guarantees to the advantage of the other party. That brings me to the case at bar.

¶ 51 As stated in our Opinion, the parties here were not of equivalent sophistication and bargaining power. The defendant, Jones, is one of this country's large financial corporations; Kloss is an elderly widow. Jones is in the

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opinions, while we upheld the arbitration agreements at issue in those cases on various grounds, we did not address the argument raised here – i.e. whether the rights to trial by jury and access to the courts under Article II, Section 26 and Article II, Section 16, may be forfeited by contractual waiver that is other than voluntary, knowing and intelligent. Similarly, the Supreme Court did not address the waiver of the Seventh Amendment right to jury trial in *Southland*. In fact, the U.S. Supreme Court has not addressed this argument in the context of any arbitration case.

business of selling securities and investment advice and services nation-wide; Kloss is an ordinary citizen with no apparent special expertise in the stock market. Kloss did not negotiate at arm's-length for the contracts at issue. Rather, she was presented with typical, standard-form, take-it-or-leave-it contracts of adhesion that, among other boiler-plate provisions, included arbitration clauses. Kloss did not read the agreements but relied upon Jones's agent, Husted, to explain the significant terms of the agreements to her, as he had in past dealings. Furthermore, as Justice Leaphart points out (and setting aside the question of whether Kloss would have understood the significance of what she was agreeing to) even if she had desired to read the contracts before signing, Jones's execution procedures insured that she would not have that opportunity.

¶ 52 With that background, I next turn to Article II of Montana's Constitution. The rights included within this "Declaration of Rights" are "fundamental rights." *Butte Community Union v. Lewis* (1986), 219 Mont. 426, 430, 712 P.2d 1309, 1311. *Accord, Wadsworth v. State* (1996), 275 Mont. 287, 299, 911 P.2d 1165, 1172; *State v. Tapson*, 2001 MT 292, ¶ 15, 307 Mont. 428, ¶ 15, 41 P.3d 305, ¶ 15. That means that these rights are significant components of liberty, *see Black's Law Dictionary*, 7th Edition, p. 683, any infringement of which will trigger the highest level of scrutiny, and, thus, the highest level of protection by the courts. *Wadsworth*, 275 Mont. at 302, 911 P.2d at 1174 (*citing Gulbrandson v. Carey* (1995), 272 Mont. 494, 502, 901 P.2d 573, 579 ("The most stringent standard, strict scrutiny, is imposed when the action complained of interferes with the exercise of a fundamental right . . .")). Two specific fundamental rights are implicated here. The first involves the right to trial by jury.

¶ 53 Article II, Section 26 of Montana's Constitution guarantees that "[t]he right of trial by jury is secured to all and shall remain inviolate." That this constitutionally guaranteed right of a jury trial is "fundamental" and, therefore, deserving of the highest level of court scrutiny and protection is beyond argument. *See, e.g., State v. LaMere,* 2000 MT 45, 298 Mont. 358, 2 P.3d 204 (requiring procedural exactitude for impaneling jury); *Woirhaye v. Montana Fourth Judicial Dist. Court,* 1998 MT 320, 292 Mont. 185, 972 P.2d 800 (striking statute that limited right to sequential jury trials as unconstitutional); *State v. Dahlin,* 1998 MT 113, 289 Mont. 182, 961 P.2d 1247 (requiring waiver of right to jury trial be evinced by written consent of both parties filed with the court in criminal proceedings); *Hammer v. Justice Court of Lewis and Clark County* (1986), 222 Mont. 35, 720 P.2d 281 (abolishing prepayment of fees for civil jury trial as obstructive).

¶ 54 As we observed in *LaMere,* the importance of the right of trial by jury derives from it having "developed in harmony with our basic concepts of a democratic society and a representative government." *LaMere,* ¶ 28 (citation omitted). "Since the time of the Magna Carta, 'trial by jury has been prized as a shield against oppression . . . [and] the approaches of arbitrary power.'" *LaMere,* ¶ 28 (citation omitted). This entitlement has been "long thought to be a safeguard against tyranny." *LaMere,* ¶ 28. The right to trial by jury is a "jealously protected safeguard against government oppression." *LaMere,* ¶ 29. And, "[t]he guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which the law should be enforced and justice administered." *LaMere,*

¶ 29 (citation omitted). Or, as Justice William Blackstone stated over two centuries ago,

> [This right] is a privilege of the highest and most beneficial nature and our most important guardian both of public and private liberty. Our liberties cannot but subsist so long as this palladium remains sacred and inviolate, not only from all open attacks, but also from all secret machinations which may sap and undermine it.

Commentaries on the Laws of England (1765), *reprinted in* Volume 2 of *In Defense of Trial by Jury* at ii (J. Kendall Few, American Jury Trial Foundation, 1993).

¶ 55 Given the sacredness and inviolability of the fundamental right to trial by jury, any contract provision that openly or subtly causes the forfeiture of the exercise of this right must be rigorously examined by the courts. This is all the more necessary when such a contract provision is included in a standard-form contract of adhesion foisted upon unsophisticated and unsuspecting ordinary citizens and small business people as part of the intercourse of daily life. Indeed, the use of such contractual provisions is at one and the same time an "open attack" on the right of jury trial and a "secret machination" causing forfeiture of that right that Blackstone predicted would "sap and undermine" the right, and with that our "public and private libert[ies]."

¶ 56 The second fundamental right at issue in the case at bar is the right of access to the courts.

¶ 57 Article II, Section 16 of Montana's Constitution guarantees that "[c]ourts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character." In my view, this right is as

much a fundamental right as is any other Article II right. This is so not only because the right of access to the courts is included within the Constitution's Declaration of Rights, but also, and just as importantly, without the right of access to the courts, other Article II rights would have little protection from infringement and, thus, little meaning. *See, Butte Community Union,* 219 Mont. at 430, 712 P.2d at 1311-13; *Wadsworth,* 275 Mont. at 299, 911 P.2d at 1172.

¶ 58 Constitutional rights that cannot be enforced are illusory. It is as if those rights cease to exist as legal rights. Montanans' fundamental rights to a jury trial, to due process and to equal protection, among others, are rendered meaningless absent the courts being able to enforce these rights. Purely and simply, access to the courts guarantees that other Article II rights are something more than mere dreams and aspirations. Access to the courts gives real existence to other fundamental rights. And, that makes access to the courts a fundamental right also, for without this right other rights have no meaning.

¶ 59 In this conclusion, I acknowledge that we have explicitly and implicitly held to the contrary. *See, Meech v. Hillhaven West Inc.* (1989), 238 Mont. 21, 776 P.2d 488; *Peterson v. Great Falls School District* (1989), 237 Mont. 376, 773 P.2d 316; *Miller v. Fallon County* (1989), 240 Mont. 241, 783 P.2d 419; *Bieber v. Broadwater County* (1988), 232 Mont. 487, 759 P.2d 145; *Linder v. Smith* (1981), 193 Mont. 20, 629 P.2d 1187; *Merchants Ass'n v. Conger* (1979), 185 Mont. 552, 606 P.2d 125. Notwithstanding, I do not see how these decisions can be squared with, much less continue to exist beside, this Court's jurisprudence holding that other Article II rights are fundamental rights.

¶ 60 This Court has stated repeatedly that a right is fundamental under Montana's Constitution if the right is either found in the Declaration of Rights or is a right without which other constitutionally guaranteed rights would have little meaning. *State v. Bird,* 2001 MT 2, ¶ 25, 308 Mont. 75, ¶ 25, 43 P.3d 266, ¶ 25 (right to be present for all court proceedings); *In re Mental Health of K.G.F.,* 2001 MT 140, ¶ 30, 306 Mont. 1, ¶ 30, 29 P.3d 485, ¶ 30 (right to effective assistance of counsel for involuntary commitment proceedings); *Armstrong v. State,* 1999 MT 261, ¶ 34, 296 Mont. 361, ¶ 34, 989 P.2d 364, ¶ 34 (right to privacy); and *MEIC v. Dept. of Environmental Quality,* 1999 MT 248, ¶ 56, 296 Mont. 207, ¶ 56, 988 P.2d 1236, ¶ 56 (right to a clean and healthful environment); *State v. Clark,* 1998 MT 221, ¶ 22, 290 Mont. 479, ¶ 22, 964 P.2d 766, ¶ 22 (right to confront and examine accusers); *State v. Weaver,* 1998 MT 167, ¶ 26, 290 Mont. 58, ¶ 26, 964 P.2d 713, ¶ 26 (right to a unanimous verdict); *Wadsworth,* 275 Mont. at 299, 911 P.2d at 1172 (right to pursue employment); *Matter of C.H.* (1984), 210 Mont. 184, 201, 683 P.2d 931, 940 (right to physical liberty). We could never have enforced the fundamental rights litigated in these and in other cases where fundamental rights were at issue had access to the courts been denied in the first instance. Indeed, without access to the courts, these other fundamental rights would have had no real existence; they would have been merely aspirations without substance.

¶ 61 The instant case and others we have considered – *Chor,* 261 Mont. 143, 862 P.2d 26; *Casarotto,* 268 Mont. 369, 886 P.2d 931; *Keystone, Inc. v. Triad Systems Corporation,* 1998 MT 326, 292 Mont. 229, 971 P.2d 1240; and *Iwen,* 1999 MT 63, 293 Mont. 512, 977 P.2d 989 – likewise demonstrate why the right of access to the courts must be

protected as the fundamental constitutional right it is. These cases point inescapably to the conclusion that, for their own obvious economic benefit, large national and multi-national corporations are effectively privatizing an important segment of the civil justice system in this country by including fine-print, non-negotiable, take-it-or-leave-it, mandatory, binding arbitration clauses in their standard-form contracts.[3]

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[3] A cursory review of the literature will reveal not only the substantial and growing support for my conclusion but also will provide citations to a multitude of cases which detail the horror stories of corporate abuse of ordinary citizens and small business people by way of the inclusion of mandatory arbitration clauses in contracts of adhesion. *See, e.g.,* Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial* (2001), 16 Ohio St. J. on Disp. Resol. 669; Margaret M. Harding, *The Redefinition of Arbitration by Those with Superior Bargaining Power* (1999), 1999 Utah L.Rev. 857; Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act,* 77 N.C. L.Rev. 931 (1999); Reginald Alleyne, *Statutory Discrimination Claims: Right "Waived" and Lost in the Arbitration Forum* (1996), 13 Hofstra Lab. L.J. 381, to name just a few.

That said, there is also little point railing against the present state of the law "favoring" arbitration. *See, Moses H. Cone Memorial Hosp. v. Mercury Consl.Corp.* (1983), 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765. I will note, however, that arbitration, historically, was designed as a method of alternative dispute resolution between merchants of equal sophistication and bargaining power (*see* Jerold S. Auerbach, *Justice Without Law?* 101-114 (1983); Ian R. MacNeil, *American Arbitration Law* 15-25 (1992)); that during the deliberations leading up to the passage of the Federal Arbitration Act (FAA), the proponents, drafters and sponsors – Senator Walsh from Montana, among others – were extremely concerned that the inclusion of arbitration clauses in adhesion contracts be voluntary because of the concomitant loss of the right of jury trial and court access (*see,* the excellent discussion of this point in *Allstar Homes, Inc. v. Waters* (1997, Ala.), 711 So.2d 924 (Cook, J. concurring); and that, with due all [sic] deference to the Supreme

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¶ 62 These are the adhesion contracts that ordinary citizens and small business people must accept if they want to acquire what most would consider to be basic and necessary services and products – household appliances, residential leases, rental cars, pest extermination, banking services, office and business equipment, phone service, consumer product warranties, household and commercial insurance, employment, credit cards, consumer and small business financing and medical attention, for example. Likewise, these are the adhesion contracts that, as in the case *sub judice,* ordinary citizens and small business people are compelled to sign if they want to participate in the national/global economy, the profits of which fuel the very existence and growth of these same national and multi-national corporations (and the election and re-election of their benefactors in government). Bankruptcy Judge James S. Sledge, Jr. recently brought this point home. He observed:

> Ask any reasonable man on the street, i.e.[,] a consumer, if he thinks it is fair that he is barred from access to the courts when he has a claim based on a form contract which contains an arbitration clause and he will respond with a resounding "No!" . . . The reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when

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Court of the United States, Justices Thomas's and Scalia's criticism of *Southland* and its progeny and their conclusion that these cases should be overruled to the extent that they apply the FAA in state court proceedings is dead right. *See, Allied-Bruce Terminix Companies v. Dobson* (1995), 513 U.S. 265, 283, 115 S.Ct. 834, 844, 130 L.Ed.2d 753 (Scalia, J. and Thomas, J., dissenting).

> he/she buys a car, a household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming the body politic.

In re Knepp, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999).

¶ 63 In short, without access to the courts, there is no way to safeguard the other fundamental rights guaranteed by Article II of Montana's Constitution. Indeed, to the extent that those rights cannot be protected by the courts, Montana's Declaration of Rights is little more than a collection of eloquent, but unenforceable, words. Access to the courts is a fundamental right, and our cases that hold to the contrary are wrong.

¶ 64 That said, my objective here is not to provide an analysis for challenging the reasoning of *Meech, Linder* and their progeny. Rather, my point is that where fundamental constitutional rights are involved – here, the right of a trial by jury and, in my opinion, access to the courts – the law is eminently clear that the waiver of such rights will not be lightly presumed. *State v. Okland* (1997), 283 Mont. 10, 15, 941 P.2d 431, 434 (presuming waiver of counsel from a silent record is impermissible); *State v. Lucero* (1968), 151 Mont. 531, 538, 445 P.2d 731, 735 (stating courts indulge every reasonable presumption against waiver of constitutional rights). A waiver of a fundamental right must be proved to have been made voluntarily, knowingly and intelligently – typically by the party seeking the waiver. *Bird,* ¶¶ 35-36; *Tapson,* ¶ 25; *Lucero,* 151 Mont. at 538, 445 P.2d at 735. For a fundamental right to be effectively waived, the individual must be informed of the consequences before personally consenting to the waiver. *Dahlin,* ¶ 22; *State v. Allison* (1944), 116 Mont. 352, 360, 153 P.2d 141, 145. And, the waiver will be

narrowly construed. *State v. Tiedemann* (1978), 178 Mont. 394, 402, 584 P.2d 1284, 1298.

¶ 65 In applying these well-settled principles of law in the context of the issue presented here, a reviewing court must consider a totality of overlapping and non-exclusive factors including: whether there were any actual negotiations over the waiver provision; whether the clause was included on a take-it-or-leave-it basis as part of a standard-form contract; whether the waiver clause was conspicuous and explained the consequences of the provision (e.g. waiver of the right to trial by jury and right of access to the courts); whether there was disparity in the bargaining power of the contracting parties; whether there was a difference in business experience and sophistication of the parties; whether the party charged with the waiver was represented by counsel at the time the agreement was executed; whether economic, social or practical duress compelled a party to execute the contract (e.g. where a consumer needs phone service and the only company or companies providing that service require execution of an adhesion contract with a binding arbitration clause before service will be extended); whether the agreement was actually signed or the waiver provision separately initialed; whether the waiver clause was ambiguous or misleading; and whether the party with the superior bargaining power lulled the inferior party into a belief that the waiver would not be enforced.

¶ 66 Returning to the record before us, there is no evidence to support a conclusion that Kloss knowingly and intelligently waived her rights to trial by jury and access to the courts when she executed Jones's standard-form contracts containing the arbitration clauses. There is no evidence that Kloss negotiated for any provision in the

contracts much less the arbitration clauses. There is no indication in the record that Kloss had counsel when she signed the agreements. And, it can hardly be argued that Kloss was on the same level of sophistication and expertise as that of Jones's agent, Husted; nor did she have any degree of equal bargaining power.

¶ 67 What the record does demonstrate, however, is that Kloss is an ordinary citizen of advanced years; that she did not read the agreements; that she was not given the opportunity to read the agreements (which, however, did contain an explanation of the consequences of the arbitration clause); and that Jones's agent, upon whom Kloss had historically relied to explain the significant parts of agreements presented to her, neither pointed out the existence of the arbitration clauses nor explained that the clauses would bar her from exercising her fundamental constitutional rights of access to Montana's courts and to a trial by jury. The record is clear. Kloss did not voluntarily, knowingly and intelligently waive her fundamental constitutional rights of trial by jury and access to the courts on the facts presented here.

¶ 68 It is to the consequences of this ineffective waiver that I next turn.

¶ 69 The United States Supreme Court has held that the Federal Arbitration Act (FAA) preempts those state laws which invalidate and are "applicable *only* to arbitration provisions." *Allied-Bruce Terminix Companies v. Dobson* (1995), 513 U.S. 265, 281, 115 S.Ct. 834, 843, 130 L.Ed.2d 753. The Court has stated that in adopting Section 2 of the FAA Congress precluded states from singling out arbitration provisions for suspect status. Rather, according to the Court, such provisions must be placed "upon the same

footing as other contracts." *Scherk v. Alberto-Culver Co.* (1974), 417 U.S. 506, 511, 94 S.Ct. 2449, 2453, 41 L.Ed.2d 270.

¶ 70 The Supreme Court has also held, however, that if a state law governs issues concerning the validity, revocability and enforceability of contracts in general – *see, Perry v. Thomas* (1987), 482 U.S. 483, 492, n. 9, 107 S.Ct. 2520, 2527, n. 9, 96 L.Ed.2d 426 – then generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening Section 2 of the FAA. *Doctor's Associates Inc., v. Casarotto* (1996), 517 U.S. 681, 687, 116 S.Ct. 1652, 1657, 134 L.Ed.2d 902 (*citing Allied Bruce,* 513 U.S. at 281, 115 S.Ct. at 843; *Rodriguez de Quijas v. Shearson/American Express, Inc.* (1989), 490 U.S. 477, 483-84, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526; *Shearson/American Express, Inc., v. McMahon* (1987), 482 U.S. 220, 226, 107 S.Ct. 2332, 2337, 96 L.Ed.2d 195).

¶ 71 In this regard Montana has long subscribed to the rule that contractual waivers of constitutional rights must be evaluated in that light and by the tests applicable to the waiver of constitutional rights. *May v. Figgins* (1980), 186 Mont. 383, 394, 607 P.2d 1132, 1138. In *May,* we recognized the general rule that parties could contract in advance to submit to *in personam* jurisdiction of a given court – there, Colorado. Nonetheless, we refused to uphold that sort of contract provision where the Colorado court was unable to exercise *in personam* jurisdiction consistent with due process. We reasoned that the contract provision amounted to a forfeiture of the constitutional right of due process, and that there was no "clear waiver" because the party charged with the waiver could not have known that the agreement he signed subjected him to the jurisdiction

of the Colorado courts. In reaching this conclusion we pointed out that there was nothing in the agreement that specified the jurisdiction as to which the charged party waived his constitutional due process rights. *May,* 186 Mont. at 394, 607 P.2d at 1138 (*citing Fuentes v. Shevin* (1972), 407 U.S. 67, 95, 92 S.Ct. 1983, 2001, 32 L.Ed.2d 556 (The right of jury trial is fundamental and courts indulge every reasonable presumption against waiver.)).

¶ 72 Quoting *Telephonic, Inc. v. Rosenblum* (1975), 88 N.M. 532, 543 P.2d 825, 830, we observed that, " '[a]n agreement to waive this constitutional right must be deliberately and understandingly made, and the language relied upon to constitute such a waiver must clearly, unequivocally and unambiguously express a waiver of this right.' " *May,* 186 Mont. at 394, 607 P.2d at 1138-39. We then went on to state that:

> To accept the respondent's argument that the defendant here contractually consented to be sued in Colorado would be to give the respondent carte blanche to use contracts of adhesion to establish a right to sue defendants wherever would be most convenient to respondents, and least convenient to defendants. The contractual provisions purporting to waive in personam jurisdiction are unreasonable and unenforceable.

May, 186 Mont. at 395, 607 P.2d at 1139.

¶ 73 Similarly, but with a contrary result, we upheld a provision whereby a party contracted away his right to the statutory exoneration of his suretyship because the waiver of rights did not involve "a constitutional right, nor a waiver in violation of public policy." *Montana Bank of Circle, N.A., v. Ralph Meyers & Son, Inc.* (1989), 236 Mont. 236, 241, 769 P.2d 1208, 1212.

¶ 74 As discussed above, Montana law generally applicable to the waiver of constitutional rights, requires that the waiver will not be lightly presumed; that it must be proved to have been made voluntarily, knowingly and intelligently – typically by the party seeking the waiver; and that it will be narrowly construed. *See* ¶ 64 infra. Importantly, Montana applies these same principles in cases where there is a purported contractual waiver of constitutional rights. Such a contractual waiver "'must be deliberately and understandingly made, and the language relied upon to constitute such a waiver must clearly, unequivocally and unambiguously express a waiver of this right.'" *May,* 186 Mont. at 394, 607 P.2d at 1138-39.

¶ 75 In this case, as already noted, there is no evidence in the record before us that Kloss voluntarily, knowingly and intelligently waived her fundamental constitutional rights to a jury trial and to access to the courts when she signed Jones's standard-form contracts. Rather, the record demonstrates the contrary. Thus, Kloss's purported waiver of her rights to a jury trial and of access to the courts was not an effective waiver in a constitutional sense.

¶ 76 That being the case, and under principles of Montana law generally applicable to all contracts, Kloss's contract with Jones cannot be enforced, at least to the extent of the arbitration clause.

¶ 77 Accordingly, for the reasons set forth in our Opinion and in this separate Opinion, I concur.

/s/ James C. Nelson
Justice

Justices Terry N. Trieweiler, W. William Leaphart and Patricia O. Cotter join in the foregoing concurrence.

/s/ Terry Trieweiler

/s/ W. William Leaphart

/s/ Patricia Cotter
Justices

IN THE SUPREME COURT OF
THE STATE OF MONTANA

No. 00-507

ALICE P. KLOSS, Plaintiff and Appellant, v. EDWARD D JONES & CO., a limited partnership, and PAUL HUSTED, Defendants and Respondents.	)	ORDER (Filed Jan. 09, 2001)

Respondents have moved this Court to stay the appeal of Alice P. Kloss (Kloss) and remand the case to the District Court to make supplemental findings based on a controlling 1998 brokerage agreement that went undiscovered until after Kloss filed her notice of appeal.

Kloss is appealing from a June 12, 2000 Order of the Eighth Judicial District Court granting Edward D. Jones & Co.'s (Jones) motion to stay proceedings and compel arbitration. Kloss first opened an account with Jones in 1989. She later opened a living trust account in 1992. In May 1998 she reorganized and opened a third account. It is this 1998 account that is the subject of the underlying litigation. Jones moved to compel arbitration and, when it failed to produce a signed 1998 brokerage agreement, contended that the 1992 brokerage agreement was controlling. The District Court agreed with Jones' argument and ordered arbitration based on the 1992 agreement and the Montana Uniform Arbitration Act. Kloss has appealed that decision and, on September 22, 2000, filed her opening brief

on appeal. On November 21, 2000, during the pendency of the appeal, Jones located Kloss' 1998 brokerage agreement at its home office in St. Louis, Missouri. The 1998 agreement contains a detachable card that contains different language than in the 1992 agreement. It instructs the client (Kloss) to return the signed signature card to her broker and retain the agreement for her files.

Having located the more recent agreement, Jones then filed a motion bringing the 1998 agreement to the attention of the Court, apologizing for the late discovery and requesting that the appeal be stayed so that the district court can make supplemental findings of fact and conclusions of law based upon the 1998 agreement rather than the 1992 agreement.

Kloss opposes the motion contending that Jones, having convinced the district court that the 1992 agreement governed the situation, is judicially estopped from now arguing that the 1998 agreement controls. "The doctrine of judicial estoppel binds a party to his or her judicial declarations, and precludes a party from taking a position inconsistent with them in a subsequent action or proceeding." Fiedler v. Fiedler (1994), 266 Mont. 133, 139, 879 P.2d 675, citing Trader's State Bank of Poplar v. Mann (1993), 258 Mont. 226, 242, 852 P.2d 604, 614. The elements of judicial estoppel are as follows:

1. The estopped party must have knowledge of the fact at the time.

2. The party must have succeeded in maintaining the original position.

3. The position presently taken must be actually inconsistent with the original position, and,

4. The original position must have misled the adverse party so that allowing the estopped party to change its position would injuriously affect the adverse party. *Fiedler*, 266 Mont. at 140.

In the present case, Jones initially argued that Kloss was bound by the 1992 agreement which contained a mandatory arbitration provision. Since the 1998 agreement which Jones now advances also contains a mandatory arbitration agreement, it cannot be said that the two positions are inconsistent. Furthermore, since Kloss has contended from the start, and now contends on appeal, that the 1992 agreement is not controlling, it cannot be said that Kloss has been misled. We determine that the elements of judicial estoppel have not been satisfied.

It makes no sense to proceed to address an appeal on the issue of whether the district court was correct in ordering arbitration under the 1992 agreement when all parties now agree that the 1992 agreement is not controlling. The 1998 agreement is clearly the controlling document with regard to litigating the 1998 transaction between Kloss and Jones. We determine that this appeal should be stayed while the matter is remanded to the district court for supplemental findings of fact and conclusions of law. See Simmons Oil Corp. v. Wells Fargo Bank, 1998 MT 129, ¶ 16, 289 Mont. 119, ¶ 16, 960 P.2d 291, ¶ 16 (staying appeal and remanding back to the district Court for consideration of whether to set aside an order and consider newly discovered evidence).

THEREFORE IT IS ORDERED that the case is remanded to District Court for supplemental findings of fact and conclusions of law based on the 1998 account agreement. Since this matter has been in litigation since

December of 1998 and given the advanced age of appellant/plaintiff Kloss, it is ordered that the District Court address this matter as soon as practical.

IT IS FURTHER ORDERED that the appeal in this matter is STAYED pending the District Court's findings and conclusions.

DATED this 9th day of January, 2001.

/s/ Karla M. Gray
Chief Justice

/s/ W. William Leaphart

/s/ James C. Nelson

/s/ Jim Regnier

/s/ Patricia Cotter
Justices

Justice Terry N. Trieweiler would deny the motion and would conclude that respondent is bound by its previous representations.

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY

ALICE P. KLOSS, Plaintiff v. EDWARD D. JONES & CO., a limited partnership, and PAUL HUSTED, Defendants	Cause No. ADV-98-1542(b) FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER

A Complaint and Jury Demand were filed in this matter on December 28, 1998. A Motion to Dismiss was filed by Defendants on February 4, 1999. A Motion to Compel Arbitration and Stay Proceedings was filed by Defendants on February 16, 1999. The parties briefed the issue and hearings were held on said Motion on October 27, 1999, and February 1, 2000, with the Honorable Marge Johnson presiding. The Court then issued its Findings of Fact, Conclusions of Law, and Order granting Defendant's Motion to Compel Arbitration and Stay Proceedings on June 12, 2000. The Plaintiff then filed a Notice of Appeal on July 6, 2000. During the pendency of the appeal the Defendants located Kloss' 1998 brokerage agreement which was at issue. The Montana Supreme Court then Ordered that the case be remanded to District Court for supplemental findings of fact and conclusions of law based on the 1998 account agreement. The Defendant then renewed its Motion to Compel Arbitration and Stay Proceedings on February 2, 2001. After allowing briefing on the issue the Court then set the matter for hearing.

The Defendant's Motion to Compel Arbitration and Stay Proceedings came on for hearing before the Court on

March 20, 2001. The Plaintiff was present and was represented by counsel, Joseph C. Engel, III. The Defendant, Paul Husted, was present and Defendants were represented by Robert James. After hearing and reviewing the evidence as well as the briefs, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff, Alice Kloss, (hereinafter referred to as Kloss) is presently 93 years old and appears to be in good mental health.

2. Defendant, Paul Husted, (hereinafter referred to as Husted) has been employed by Defendant Edward D. Jones & Co. as a stockbroker since 1982.

3. Kloss was referred to Husted in 1985 after she became dissatisfied with D.A. Davidson and sought a new stockbroker.

4. Kloss opened a full service brokerage account on July 30, 1989, which allowed her to purchase stocks, other securities, and maintain a money market account from which she could purchase securities and deposit income from investments.

5. Kloss was provided with a copy of this 1989 agreement. The agreement contained a provision requiring mandatory arbitration of disputes between the parties.

6. Kloss established a living trust account with Jones under a full service brokerage account on or about April 20, 1992.

7. Husted was the Jones' employee who assisted Kloss in opening the account.

8. Kloss was provided with a two page "Customer Account Agreements for Full Service and Customer Loan Accounts – General Account Provisions" document, a two page "Customer Loan Agreement" which did not apply to her full service account, and a one and a one-half page "Full Service Account Agreement." This agreement also contained a provision requiring mandatory arbitration of disputes between the parties.

9. The 1992 "Customer Account Agreements for Full Service and Customer Loan Accounts – General Account Provisions" contains a section as follows:

> ARBITRATION
>
> 1. Arbitration is final and binding on the parties.
>
> 2. The parties are waiving their right to seek remedies in court, including the right to jury trial.
>
> 3. Pre-arbitration discovery is generally more limited than and different from court proceedings.
>
> 4. The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.
>
> 5. The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

10. The remainder of the headings in the 1992 above-referenced document are not in capital letters.

11. The 1992 "Full Service Account Agreement" states in capital bold letters:

THE FULL SERVICE ACCOUNT AND THE CUSTOMER LOAN ACCOUNT AGREEMENTS CONTAIN A PRE-DISPUTE ARBITRATION CLAUSE WHICH IS INCORPORATED BY REFERENCE FROM THE GENERAL ACCOUNT PROVISIONS ON PAGE TWO AT PARAGRAPH 12. BY MY SIGNATURE BELOW I ACKNOWLEDGE THAT I HAVE RECEIVED A COPY OF THIS DOCUMENT.

12. Kloss signed a detachable card indicating Acknowledgment of Full Service Account dated April 20, 1992.

13. The detachable card was then sent to the Defendant's home office in St. Louis in order to activate the sweeper function of the money market account.

14. Kloss established a charitable remainder trust with independent counsel in May of 1998. Kloss was the trustee of said trust.

15. Kloss then met with Husted several times in May of 1998 to reorganize her accounts pursuant to the charitable remainder trust.

16. Kloss again activated a full service account under a document entitled "Customer Account Agreements for Full Service and Customer Loan Accounts" (hereinafter referred to as Full Service Agreement).

17. Kloss signed the Full Service Agreement and a Living Trust Account Form on May 28, 1998, after being presented with the documents by Donna Ferderer, an employee of Defendant Jones.

18. Kloss was provided with a copy of the 1998 Full Service Agreement by Ferderer on May 28, 1998. This agreement also contained a provision requiring mandatory arbitration of disputes between the parties.

19. The 1998 Full Service Agreement is a five page, single spaced document. The document has many headings which are bold type and the underlying text is in regular print.

20. The 1998 Full Service Agreement has an arbitration provision. The paragraphs on arbitration are approximately one-half of a page long. Both the heading and the underlying half-page of text on arbitration are in bold print.

21. The arbitration portion of the 1998 Full Service Agreement is the only underlying text which is in bold print in the entire agreement.

22. The Full Service Agreement was drafted by and printed on an Edward D. Jones form.

23. Clients do not have input on the contents of said form. If clients wish to open a full service account with Defendant they must sign the agreement.

24. Kloss had the opportunity to read the terms of the agreement before she signed it. Kloss did not do so.

25. Husted's normal procedure in opening accounts, which he followed with Kloss, is to explain what he believes to be the significant features of the account from an investment perspective, including the sweeper provision of the money market account.

26. Husted did not consider the arbitration provision to be a significant provision of the contract.

27. Husted did not hide the arbitration provision from Kloss.

28. Husted does not routinely explain the arbitration provision to clients and did not explain it to Kloss.

29. Kloss would have been able to understand the arbitration provision had she read it.

30. Donna Ferderer presented Kloss with a detachable card acknowledging the Full Service Agreement. The card is part of the Full Service Agreement itself and has to be torn away from the agreement to be sent off to the home office. The card states:

> The Full Service Account and the Customer Loan Account Agreements contain a predispute arbitration clause that is incorporated by reference from the general account provisions on pages 1 and 2. By my signature below, I acknowledge that I have received a copy of this document. Detach and return signature card only. Client retains Agreement.

31. Donna Ferderer witnessed Kloss sign the detachable card on May 28, 1998.

32. Donna Ferderer dated the detachable card June 1 (no year) which was the date that she faxed the card to the home office in St. Louis.

33. Kloss admits signing the detachable card in 1998, which acknowledges the arbitration provision set forth in the Full Service Agreement.

34. Kloss denies that she was provided with a copy of the 1992 and 1998 Full Service Agreements although she admits that she saw the 1998 agreement and asked Husted questions about it.

35. The contract in dispute was negotiated and entered into in Montana; the domicile of Kloss, Husted, and Jones is Montana.

36. Edward Jones & Co. is engaged in interstate commerce.

37. The execution of business on Kloss' account required the use of interstate commerce.

34. [sic] Husted and Ferderer have used the same process for the signing of Full Service Agreements and the detachable card in activating approximately 10,000 accounts.

35. [sic] Defendant and Edward D. Jones followed their customary practice in the presenting and signing of the Full Service Agreement and detachable card with Kloss.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter.

2. The parties entered into the 1998 Full Service Agreement, which is an enforceable contract between the parties.

3. The Uniform Arbitration Act codified as MCA 27-5-114(1) provides:

> A written agreement to submit to arbitration any controversy arising between the parties after the agreement is made is valid and enforceable except upon grounds that exist at law or in equity for the revocation of a contract.

4. The Federal Arbitration Act (FAA) applies to any case where there is a written provision in a contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy arising out of such contract. 9 U.S.C. § et seq.

5. The FAA requires courts to 'rigorously enforce agreements to arbitrate.' *Shearson/American Express, Inc.*

v. McMahon, 482 U.S. 220, 226, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987).

7. [sic] Kloss' argument that she did not read the arbitration provision and was not informed of its application does not defeat the requirement to arbitrate.

8. In *Chor v. Piper, Jaffray & Hopwood*, 261 Mont. 143, 862 P.2d 26 (1993), the plaintiff entered into a "Co-Owner Account Agreement" related to the purchase of investments. The agreement contained an arbitration provision. Chor sought to avoid arbitration by claiming that she didn't understand the arbitration provision and that the investment firm had not informed her of the legal implications of the provisions. The Court held the arbitration provision enforceable stating:

> We are unwilling to construe . . . that a stockbroker has a duty to disclose to his customers every possible misunderstanding which might be reached upon signing a contract. . . . We know of no case holding that parties dealing at arms' length have a duty to explain to each other the terms of a written contract. We decline to impose such an obligation where the language of the contract clearly and explicitly provides for arbitration of disputes arising out of the contractual relationship. *Id.* at 152.

9. The principles of contract law presume that a party who entered into a contract read the contract and understood its terms.

10. The Full Service Agreements of 1992 and 1998 are not contracts of adhesion. Kloss had the ability to do business with other brokerage houses, as she had in the past. Even if determined to be a contract of adhesion,

the Montana Supreme Court has stated that an arbitration clause in an adhesion contract will not be enforced against the weaker party when it is: (1) not within the reasonable expectations of said party, or (2) within the reasonable expectations of the party, but when considered in its context, is unduly oppressive, unconscionable, or against public policy. *Passage v. Prudential-Bache Sec., Inc.*, 223 Mont. 60, 66, 727 P.2d 1298 (1986).

11. The arbitration clauses contained in the 1992 and 1998 Full Service Agreements were within the reasonable expectations of Kloss as they are contained within the agreements that she signed.

12. The arbitration clauses contained in the 1992 and 1998 Full Service Agreements were not unconscionable. Unsconscionability requires a two-fold determination: (1) that the contractual terms are unreasonably favorable to the drafter and (2) that there is no meaningful choice regarding the acceptance of the agreement. *Iwen v. U.S. West, a division of U.S. West Marketing Resources Group, Inc.*, 293 Mont. 512, 977 P.2d 989 (1999). Contrary to the factual situation in *Iwen*, the arbitration provision at issue was a mutual restriction placed upon both parties to the contract, not just Kloss. Therefore, Kloss has failed to prove the first prong of the test. Kloss further failed to satisfy the second prong of *Iwen* in that she had the choice not to enter into the agreement with Defendants if she did not wish to as there are other brokerage houses available for her business.

Based upon the Findings of Fact and Conclusions of Law the Court hereby enters the following:

ORDER

IT IS THEREFORE HEREBY ORDERED that:

1. The Defendant's Motion to Stay Proceedings and Compel Arbitration is GRANTED.

2. The parties are ordered to arbitrate this matter as required by the Full Service Agreement.

DATED this 26th day of March, 2001.

/s/ Julie Macek
Julie Macek
District Judge

cc: Joseph C. Engel, III
✓ Robert James

MONTANA EIGHTH JUDICIAL DISTRICT COURT,
CASCADE COUNTY

ALICE P. KLOSS, Plaintiff, v. EDWARD D. JONES & CO., a limited partnership and PAUL HUSTED, Defendants.	**Cause No. ADV-98-1542(b)** FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER

The Defendants' Motion to Stay Proceedings and Compel Arbitration came on for hearing before the court on Wednesday, October 27, 1999. A second hearing was held on February 1, 2000. The Plaintiff was present, represented by counsel Joseph C. Engel, III. The Defendant, Paul Husted was present and Defendants were represented by Robert James and James Donahue. After hearing and reviewing the evidence and reviewing the post-hearing briefs filed by the parties, I make the following:

FINDINGS OF FACT

1. Plaintiff, Alice Kloss, is presently 93 years old and of apparently good physical and mental health. She is a resident of Cascade County, Montana.

2. Defendant Paul Husted is employed by Defendant Edward D. Jones & Co. as a stock broker, and has been employed in that capacity since 1982.

3. Paul Husted first met Alice Kloss in 1985. She had been referred to him by one of his customers.

4. On or about April 20, 1992, Mrs. Kloss opened a living trust account with Mr. Husted.

5. The Living Trust Account which Mrs. Kloss opened with Mr. Husted was called a Full Service Account Agreement. It created some new accounts, including a charitable remainder trust, into which part of Mrs. Kloss' personal assets were transferred from her personal account.

6. The Full Service Agreement is a six-page, fine-print document, which contains many different provisions, including, a paragraph on page 2 which is headed all in capital letters: "ARBITRATION."

7. The Full Service Agreement was drafted by Edward Jones, and printed on an Edward Jones form. The document at issue is a form dated 12/91.

8. Clients do not have any input on the contents of the agreement. It is presented to them as is for their signature and they must sign the agreement as is if they wish to open an account with the Defendants.

9. While there are certainly other investment brokers in Great Falls, no evidence was presented which would lead me to believe Mrs. Kloss had any meaningful choice in accepting or rejecting an arbitration provision of such a contract or that other stock brokers offered contracts at that time for similar accounts which did not contain an arbitration provision. I have no reason to believe that was not a fairly standard practice at that time, and that she had no meaningful choice regarding acceptance of the agreement if she wished to open an investment account, which is what I do believe and find as a fact.

10. The arbitration provision is a unilateral provision of the brokerage houses contained in a contract presented to clients as is with no meaningful opportunity

to negotiate its presence in the contract. A client may, however, refuse to sign such an agreement and may seek to obtain a contract without such a provision from this or competitor companies. It is reasonable to assume that such contracts commonly contain such a provision today, regardless of the brokerage house with which a client is dealing.

11. The arbitration provision states in numbered subparagraphs that arbitration is final and binding on the parties, that the parties are waiving their right to seek remedies in court, including the right to a jury trial, that pre-arbitration discovery is generally more limited than and different from court proceedings, that the arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited, and that the panel of arbitrators will typically include a minority of arbitrators who were affiliated with the securities industry.

12. Mrs. Kloss liked and trusted Mr. Husted and expected that he would explain to her anything that she needed to know that was significant.

13. She did have an opportunity to read the agreement before she signed it, and was capable of doing so, but did not do so, relying instead upon Mr. Husted to advise her of the significant features of the agreement.

14. Mr. Husted, in opening accounts, such as that which Mrs. Kloss opened with him in 1992, explains what he believes to be the significant features from an investment perspective, including the sweeper provision which moves cash into a money market account automatically and the loan provision of the contract.

15. Mr. Husted did not consider the arbitration provision to be a significant provision of the contract.

16. Mr. Husted did not hide the arbitration provision from Mrs. Kloss. He may well not have even been aware of the provision as indicated by the affidavit submitted by Plaintiff with her post-hearing brief, which affidavit was not responded to by the Defendants. If he was unaware of the provision, his failure to point it out to Mrs. Kloss would not derive from any desire to hide it from her or to defraud her.

17. He does not routinely explain and did not explain to Mrs. Kloss the arbitration provision of the contract.

18. She did not read and was not aware of the arbitration provision of the contract.

19. Mrs. Kloss understood she had to sign the documents presented to her in order to open the account with Mr. Husted.

20. To the extent she read the agreement or had questions about the agreement or about Mr. Husted's explanation, she asked him questions, but she did not question him about the arbitration provision.

21. She did not read or fully understand the agreement or exactly what she was doing with her assets when she opened the account, but she would have been able to understand the arbitration provision had she read it.

22. Neither Mr. Husted nor Defendant Edward D. Jones & Co. are able to locate a signed copy of the agreement or of Mrs. Kloss' acknowledgment of the arbitration provision of the contract. They have a card signed by Mrs. Kloss which is dated 4-20-92 and states that it is an "Acknowledgment for Full Service Account Only Application for Daily Passport Cash Trust".

23. The card itself does not acknowledge receipt of a copy of the agreement or that the agreement incorporates

an arbitration provision which waives the right to court remedies.

24. The card signed by Mrs. Kloss and which is provided for the client's signature in opening investment accounts, is routinely detached from the Agreement, which is to be given to the client. The last sentence on the portion which is to be retained by the client states in larger letters and in all capital letters:

> THE FULL SERVICE ACCOUNT AND THE CUSTOMER LOAN ACCOUNT AGREEMENTS CONTAIN A PRE-DISPUTE ARBITRATION CLAUSE WHICH IS INCORPORATED BY REFERENCE FROM THE GENERAL ACCOUNT PROVISIONS ON PAGE TWO AT PARAGRAPH 12. BY MY SIGNATURE BELOW I ACKNOWLEDGE THAT I HAVE RECEIVED A COPY OF THIS DOCUMENT."

25. The parties agree that Mrs. Kloss was very careful about her dealings, her investments, and kept careful records. She keeps all of her investment records in a locked drawer. She also had a notebook which Mr. Husted gave her, in which she kept some of the documents she received from Mr. Husted and often brought with her when she met with him. He arranged the documents in the notebook for her.

26. She does not recall receiving a copy of the agreement and her records do not include a copy of the agreement to which the card, which she signed, was attached.

27. Mr. Husted did not provide Ms. Kloss with a copy of the agreement and she did not otherwise receive a copy of the agreement before this dispute arose.

28. The original card which Ms. Kloss signed was forwarded to Defendant Edward Jones & Co.'s office in St. Louis, Missouri.

29. Neither Paul Husted nor anyone else at the local office of Edward Jones & Co. has in their files a copy of the card signed by Mrs. Kloss or of the agreement to which it relates. Nor does the office in Missouri have the agreement to which the card was originally attached.

30. I do not believe, nevertheless, that Mr. Husted presented Mrs. Kloss with just a detached card to sign, since she testified that she recalled seeing the agreement and that she asked Mr. Husted questions about it which he did not answer to her satisfaction. I believe she simply did not read the entire agreement and Mr. Husted did not explain the entire agreement to her or ensure that she read it through entirely, and he did not give the agreement to her once she signed it.

31. Plaintiff alleges in this lawsuit violation of statutory duty; violation of the Montana Consumer Protection Act; breach of fiduciary duty; fraud and negligence. These claims arise out of factual allegations that Defendant Paul Husted improperly influenced the Plaintiff to divest herself of her estate and donate it to charity.

32. The Defendants seek to enforce the arbitration clause contained in the Full Service Account document on the basis of the detached signature card dated April, 1992, bearing the Plaintiff's signature, and compel arbitration of the claims alleged by Plaintiff in her complaint in this matter, on grounds that the signature card is proof that Plaintiff agreed to the terms of the Full Service Account document.

33. The "Full Service Account" states that the law of Missouri applies, but neither party has presented me with law or argument indicating that Missouri law varies from Montana law with respect to the issue of the enforceability of the arbitration clause under the facts found in this case. I have for that reason reached my conclusions applying Montana law and assuming that it is similar to Missouri law.

34. The place of contracting was Montana; the place of negotiation of the contract was Montana; the place of performance of the contract was Montana; the location of the subject matter was Montana; and the domicile of the plaintiff, defendant Husted, and the office of Defendant Edward Jones & Co. where the contract was entered into, is Montana.

35. Edward Jones & Co., a stock brokerage firm, is engaged in interstate commerce.

36. Mrs. Kloss intended to open an investment account with Edward D. Jones & Co. and that the conduct of the account and its transactions would require the use of interstate commerce.

37. No evidence was presented regarding the cost of arbitration to the Plaintiff and whether such cost renders the arbitration provision unenforceable as argued by Plaintiff's counsel in her post-hearing brief.

38. The agreement does not specify any particular rules of arbitration that would apply to the arbitration of this dispute. I can not for that reason rule that the provision is unenforceable because Mrs. Kloss did not receive a copy of the agreement incorporating that provision, as might be required by any particular arbitration rules.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The court has jurisdiction of this matter.

2. A fundamental public policy of this state is to protect the substantive rights of Montana residents to seek redress in the courts of Montana.

3. The initial inquiry of the court is to determine whether or not the parties in fact have an agreement to arbitrate. The court holds that the parties did have an agreement, and the "Full Service Account" document is enforceable as a contract between the parties.

4. While both parties rely on Montana case law in support of their arguments, it is appropriate for this court to apply a mixture of Montana and federal statutory law and court decisions construing the enforceability of arbitration provisions pursuant to the Federal Arbitration Act (FAA).

5. The "Uniform Arbitration Act" found in chapter 5 of Title 27 of the Montana Code Annotated provides:

> A written agreement to submit an existing controversy to arbitration is valid and enforceable except upon grounds that exist at law or in equity for the revocation of a contract.

6. The FAA applies to any case where there is a written provision in a contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract. 9 U.S.C. § et seq.

7. The FAA creates a body of federal substantive law of arbitrability which is applicable to any arbitration agreement falling within the Act. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 753 (1983).

8. The term "involving commerce" in the FAA has been construed by the United States Supreme Court as invoking the broadest measure of Congress' authority under the Commerce Clause. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. ___, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

9. The Montana Supreme Court has enforced arbitration agreements although initially reluctant to do so. In *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 116 S.Ct. 1652 (1996), overruling *Casarotto v. Lombardi*, 274 Mont. 3, 901 P.2d 596 (1995), the United States Supreme Court held that the FAA preempted portions of Montana's Arbitration Act. As a result, the Montana Supreme Court's ruling that arbitration was not required under Montana law was reversed and arbitration was required where a franchisee alleged the franchisor had breached the franchise contract by licensing an additional franchisee in a location originally sought by the first franchisee. *Doctor's Associates*, 517 U.S. at 687. The Montana Supreme Court had ruled that the arbitration clause in the contract was unenforceable because it did not meet the notice requirements of the Montana Arbitration Act as it existed at that time. The United States Supreme Court struck the notice requirement because it was preempted by the FAA and ordered arbitration.

10. In *Downey v. Christensen*, 251 Mont. 386, 825 P.2d 557 (1992), the plaintiff filed suit over the alleged breach of a donut shop franchise agreement. After the plaintiff served discovery requests and the defendants

responded, the defendants sought to enforce an arbitration clause in the franchise agreement. The District Court refused, holding that by answering discovery, the defendants had waived arbitration. The Montana Supreme Court reversed, finding that the lack of prejudice to the plaintiff showed a lack of waiver and ordered arbitration. *Downey*, 251 Mont. at 391.

11. These decisions are in accord with federal policy, which favors arbitration when a question of arbitration is raised and an arbitration agreement exists. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987):

> The (Federal Arbitration) Act was intended to revers[e] centuries of judicial hostility to arbitration agreements by plac[ing] arbitration agreements upon the same footing as other contracts.

482 U.S. at 225-26 (citations omitted).

12. That same case further holds:

> The Arbitration Act accomplishes this purpose by providing that arbitration agreements, 'shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2. The FAA requires courts to, 'rigorously enforce agreements to arbitrate.' *Id.* 482 U.S. at 226 (citations omitted)
>
> Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that would provide grounds for the revocation of any contract, the Arbitration Act provides no

> basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability. *Id.* (citations omitted).

13. I have found that Mrs. Kloss did not read the entire agreement between the parties when it was presented to her; that Mr. Husted did not explain the entire agreement to her or ensure that she read it through entirely, and that he did not give the agreement to her once she signed it. However, I do not find that those facts are sufficient to invalidate the arbitration provision of the parties' agreement.

14. Where there is a valid arbitration agreement, whether or not there was a meeting of the minds so that the agreement is valid and enforceable is a subject which must itself be arbitrated.

15. Mrs. Kloss' argument that she never read the arbitration provision and was never informed of its impact does not defeat the requirement to arbitrate.

16. In *Chor v. Piper, Jaffray & Hopwood*, 261 Mont. 143, 862 P.2d 26 (1993), the plaintiff entered into a "Co-Owner Account Agreement" related to the purchase of investments. The agreement included an arbitration provision. When Chor filed suit related to her investment relationship with Piper, Jaffray, & Hopwood, the investment firm filed a motion to compel arbitration. Chor sought to avoid arbitration stating that she did not understand the arbitration provision and that the investment firm had not informed her of the legal implications of the provision. The court held the arbitration provision enforceable stating:

> We are unwilling to construe . . . that a stockbroker has a duty to disclose to his customers every possible misunderstanding

> which might be reached upon signing a contract. . . . We know of no case holding that parties dealing at arm's length have a duty to explain to each other the terms of a written contract. We decline to impose such an obligation where the language of the contract clearly and explicitly provides for arbitration of disputes arising out of the contractual relationship. *Id.* at 152.

17. The principles of contract construction presume that a party who had entered into a contract read the agreement and understands its terms where the party is capable of doing so, as in this case. This principle has been applied by the federal courts and by the Montana Supreme Court to arbitration provisions in contracts of adhesion. *See Passage v. Prudential-Bache Sec., Inc.*, 223 Mont 60, 66, 727 P.2d 1298 (1986).

18. Contracts of adhesion are not against the law and are, in fact, very commonly used in commercial transactions. The term refers to a standardized form of agreement, usually drafted by the party having the superior bargaining position, which that party then presents to the other with no opportunity to negotiate its terms. *Id.*, citing *Finkle and Ross v. A.G. Becker Paribas, Inc.*, 622 F. Supp. 1505, 1511-12 (D.C.N.Y. 1985). An individual either accepts the contract as presented or runs the risk of exclusion from the market. *Id.*

19. Contracts of adhesion, due to commercial realities, are commonly used and generally enforced, unless the provision attacked oversteps the bounds of the reasonable expectations of the parties. *Passage v. Prudential-Bache Sec.*, 223 Mont. 60, 727 P.2d 1298 (1986). The court held in that case that an arbitration provision in a contract of adhesion is not per se

contrary to public policy and will be upheld absent a strong showing that it should be set aside. The court stated:

> For such a contract or clause to be void, it must fall within judicially imposed limits of enforcement. It will not be enforced against the weaker party when it is: 1) not within the reasonable expectations of said party, or 2) within the reasonable expectations of the party, but when considered in its context, is unduly oppressive, unconscionable or against public policy. *Id.* at 66.

20. Mrs. Kloss has failed to prove that grounds exist at law or equity for the revocation of the contract or invalidation of the arbitration provision, which she was surely capable of reading and understanding. Mrs. Kloss was given an opportunity to read the agreement before signing it. She also had the opportunity to ask Mr. Husted any questions about the agreement – and chose to ask some. Mrs. Kloss was free not to sign the agreement and take her business to any of several other securities dealers in Great Falls but, very likely would have been required to sign a contract including an arbitration agreement if she had chosen to do so.

21. The agreement, and its arbitration clause, is not unconscionable. The Montana Supreme Court has developed a two prong test for unconscionability. *Iwen v. U.S. West, a Division of U.S. West Marketing Resources Group, Inc.*, 293 Mont. 512, 977 P.2d 989 (1999). In order for Mrs. Kloss to prove that the arbitration clause in unconscionable, she must show that: 1) the clause is unreasonably favorable to Edward D. Jones & Co., and 2) there is no meaningful choice on her part regarding acceptance of the agreement.

22. Mrs. Kloss has failed to prove the first prong of this test.

23. The terms of the arbitration clause are equally favorable to both parties in that the clause in this case requires both parties to submit all matters regarding handling of the account to arbitration. The terms of the clause give Edward Jones & Co. absolutely no advantage over Mrs. Kloss. The first prong of the test set out in *Iwen* is not satisfied, and the arbitration clause in [sic] not unconscionable.

24. This contract was offered to Mrs. Kloss as is. I do not believe that Mrs. Kloss had a meaningful choice regarding acceptance of the arbitration clause, if she wanted to do business with a brokerage firm in Great Falls. She was free to inquire of other brokerage firms to see if she could find a firm that would not require her to submit any disputes to arbitration. She did not do this and I have no evidence whether such agreements were available. The second prong of *Iwen* is not satisfied, however, and the arbitration clause is not clearly unconscionable.

ORDER

IT IS THEREFORE HEREBY ORDERED that:

1. The Defendant's Motion to Stay Proceedings and Compel Arbitration is GRANTED.

2. The parties are ordered to arbitrate this matter as required by the agreement.

DATED this 12th day of June 2000.

/s/ Marge Johnson
District Judge

cc: Joseph C. Engel, III
Robert James/James Donahue

No. 00-507

IN THE SUPREME COURT OF THE
STATE OF MONTANA

2002 MT 129A

ALICE P. KLOSS, Plaintiff/Appellant, v. EDWARD D. JONES & CO., a limited partnership, and PAUL HUSTED, Defendants/Respondents.	)	ORDER (Filed Sep. 25, 2002)

The Respondents, Edward D. Jones & Co. and Paul Husted have petitioned this Court pursuant to Rule 34, M.R.App.P., for rehearing. Rule 34 provides in part:

> A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed.

Respondents raise several bases for rehearing. However, we limit our consideration to Respondents' contention that this Court overlooked a material fact when it stated in ¶ 36 of its Opinion that Jones and Husted had discretion to buy and sell securities pursuant to Kloss's 1992 agreement with them. Respondents contend that although Kloss entered into a Full Service Agreement with

Jones in 1992 and although there was a provision in the agreement entitled "Customer Loan Agreement" which did authorize Jones and Husted to buy and sell securities, Kloss did not exercise that option.

In response, the Appellant, Alice P. Kloss, points out that whether or not she was a party to the "Customer Loan Agreement" in 1992, a similar or identical provision giving Jones and Husted discretion to buy and sell securities was a part of her 1998 agreement and it is pursuant to that agreement that she contends that Respondents breached their fiduciary duty. Kloss is correct.

Therefore, we deem it appropriate to grant the Respondents' Petition for Rehearing to the extent that the year "1992" in the second line of ¶ 36 is stricken and the year "1998" is substituted therefore.

The Respondents' Petition for Rehearing not otherwise satisfying the requirements of Rule 34, M.R.App.P., is DENIED.

The Clerk of the Supreme Court is directed to mail a copy of this Order to Robert F. James, P.O. Box 1746, Great Falls, Montana 59403, and to Joseph C. Engel, P.O. Box 3222, Great Falls, Montana 59403.

DATED this 25th day of September, 2002.

/s/ Terry Trieweiler

/s/ James C. Nelson

/s/ Patricia Cotter

_____

_____

Justices

Justice W. William Leaphart dissenting.

I would grant the petition for rehearing as it applies to Issue Number 2 – did the District Court err when it failed to consider whether Defendants owed Kloss a fiduciary duty to explain the arbitration agreement?

The Court cites *Chor v. Piper, Jaffray & Hopwood, Inc.* (1993), 261 Mont. 143, 153, 862 P.2d 26, 32, for the proposition that "[i]n the absence of discretionary authority by a stockholder to buy and sell in a customer's account, no fiduciary relationship is created in a broker-customer relationship." Turning then to the question of whether Mrs. Kloss' account was discretionary, the Court notes that under the 1998 Agreement, there was a "Liquidation of Collateral or Account" section which authorizes the broker to sell the customer's property when, "in your discretion you consider it necessary for your protection." Given this provision, the Court, citing the "plain language" of the Agreement, concludes that the Account was discretionary. Since the Court deems the Account to have been discretionary, it goes on to conclude: "We hold that Husted owed Kloss a fiduciary duty which included explaining the consequences of the arbitration provision Jones now seeks to enforce."

The Court has overlooked a fact material to the decision – that is, the "Liquidation of Collateral or Account" section relied upon as the basis for imposing a fiduciary duty is not part of the general Customer Account Agreement. Rather, it is contained in the "Customer Loan Agreement." When put in its proper context, the "Liquidation of Collateral or Account" clause is only triggered if the client opts to establish a creditor/debtor relationship by exercising her option to borrow against her securities and

take out a margin loan or a personal line of credit loan and if her equity in her collateral drops below the minimum level specified by Regulation T of the federal regulations. In the present case, there is no suggestion that Kloss borrowed against her margin account, and, thus, the Customer Loan Agreement simply does not come into play in this analysis.

The arbitration clause in question is contained in the Customer Account Agreement. The question of whether Jones had a fiduciary duty to explain the consequences of the arbitration provision must be resolved by looking at the plain language of the Customer Account Agreement to determine whether it was discretionary. There is nothing in the Customer Account Agreement which gives the broker discretionary authority to buy and sell clients' securities. The Customer Account Agreement is simply not a "discretionary" account, and the fact that the Customer Loan Agreement, a separate and distinct agreement, has a "Liquidation of Collateral or Account" provision is of no consequence. The Customer Loan Agreement was never activated since Kloss did not trade on margin.

Kloss argues that Jones sold her securities without her permission and did so pursuant to the discretion granted under the Liquidation of Collateral or Account provision. If that is proven, then that would constitute a violation of the Customer Loan Agreement which grants discretion only in the event Kloss borrowed against her securities – which she did not. That breach, however, would not retroactively transform the Customer Account Agreement into a discretionary account whereby the broker was required to explain the consequences of the arbitration provision. The Customer Account Agreement

was, from its inception and by its own terms, either discretionary or nondiscretionary.

The Court has overlooked the fact that the Customer Account Agreement was nondiscretionary. Thus, under the holding in *Chor*, it did not trigger a fiduciary obligation to explain the consequences of the arbitration provision. I would grant the petition for rehearing on this issue.

/s/ W. William Leaphart
Justice

Justice Jim Rice joins in the foregoing dissent of Justice Leaphart.

/s/ Jim Rice
Justice

ARBITRATION CLAUSE IN 1992 EDWARD JONES FULL SERVICE AGREEMENT

ARBITRATION

1. Arbitration is final and binding on the parties.

2. The parties are waiving their right to seek remedies in court, including the right to jury trial.

3. Pre-arbitration discovery is generally more limited than and different from court proceedings.

4. The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

5. The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

I agree that this Agreement shall be governed by the laws of the State of Missouri without giving effect to the choice of law or conflict of laws provisions thereof. Any controversy arising out of or relating to any of my accounts or transactions with you, your officers, directors, agents and/or employees for me, or to this agreement, or the breach thereof, or relating to transactions or accounts maintained by me with any of your predecessor or successor firms by merger, acquisition or other business combinations from the inception of such accounts shall be settled by arbitration in accordance with the rules then in effect of the Boards of Directors of the New York Stock Exchange, Inc., the American Stock Exchange, Inc., the Municipal Securities Rulemaking Board, or the National Association of Securities Dealers, Inc. as I may elect. If I do not make such election by registered mail addressed to you at your main office within five (5) days after demand

by you that I make such an election, then you will have the right to elect the arbitration tribunal of your choice. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

ARBITRATION CLAUSE IN 1998 EDWARD JONES FULL SERVICE AGREEMENT

Arbitration

1. Arbitration is final and binding on the parties.

2. The parties are waiving their right to seek remedies in court, including the right to jury trial.

3. Pre-arbitration discovery is generally more limited than and different from court proceedings.

4. The arbitrators' award is not required to include factual findings or legal reasoning, and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.

5. The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.

I agree that this Agreement shall be governed by the laws of the State of Missouri without giving effect to the choice of law or conflict of laws provisions thereof. Any controversy arising out of or relating to any of my accounts or transactions with you, your officers, directors, agents and/or employees for me, or to this agreement, or the breach thereof, or relating to transactions or accounts maintained by me with any of your predecessor or successor firms by merger, acquisition or other business combinations from the inception of such accounts shall be settled by arbitration in accordance with the rules then in effect of the Boards of Directors of the New York Stock Exchange, Inc., the American Stock Exchange, Inc., the Municipal Securities Rulemaking Board or the National Association of Securities Dealers, Inc. as I may elect. If I do not make such election by registered mail addressed to you at your main office within five (5) days after demand

by you that I make such an election, then you will have the right to elect the arbitration tribunal of your choice. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action, or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

RELEVANT CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

Section 7 of the Securities Exchange Act of 1934 provides in relevant part:

> For the purpose of preventing the excessive use of credit for the purchase or carrying of securities, the Board of Governors of the Federal Reserve System shall, prior to the effective date of this section and from time to time thereafter, prescribe rules and regulations with respect to the amount of credit that may be initially extended and subsequently maintained on any security (other than an exempted security). 15 U.S.C. § 78g(a).

Regulation T § 1(a), provides:

> Authority and purpose. Regulation T (this part) is issued by the Board of Governors of the Federal Reserve System (the Board) pursuant to the Securities Exchange Act of 1934 (the Act) (15 U.S.C. 78a *et seq.*). Its principal purpose is to regulate extensions of credit by brokers and dealers; it also covers related transactions within the Board's authority under the Act. It imposes, among other obligations, initial margin requirements and payment rules on certain securities transactions. 12 C.F.R. § 220.1(a) (2001).

Regulation T § 1(b)(2) provides:

> This part does not preclude any exchange, national securities association, or creditor from imposing additional requirements or taking action for its own protection. 12 C.F.R. § 220.1(b)(2) (2001).

Regulation T § 2 provides in relevant part:

> Creditor means any broker or dealer (as defined in sections 3(a)(4) and 3(a)(5) of the Act), any member of a national securities exchange, or any person associated with a broker or dealer (as defined in section 3(a)(18) of the Act), except for business entities controlling or under common control with the creditor. 12 C.F.R. § 220.2 (2001).

Regulation T § 4(d) provides:

> Liquidation in lieu of deposit. If any margin call is not met in full within the required time, the creditor shall liquidate securities sufficient to meet the margin call or to eliminate any margin deficiency existing on the day such liquidation is required, whichever is less. If the margin deficiency created or increased is $1000 or less, no action need be taken by the creditor. 12 C.F.R. § 220.4(d) (2001).

No. 02-1112

Supreme Court, U.S.
FEB 26 2003

In The

Supreme Court of the United States

EDWARD D. JONES & CO., L.P. d/b/a
EDWARD JONES, AND PAUL HUSTED,

Petitioners,

v.

ALICE P. KLOSS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Montana

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Does the Federal Aribitration Act pre-empt a State Court decision that undisclosed arbitration provisions are unenforceable under generally applicable principles of adhesion contract, fiduciary duty and contractual waiver of constitutional rights law?

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COUNTER STATEMENT OF THE CASE

Respondent is a 96-year-old widow. See Pet. App. 3. Compared to Petitioners, she had no bargaining power and was relatively unsophisticated. Pet. App. 18 and 23-24. Petitioners became Respondent's stockbrokers in 1989. Pet. App. 3. Over the next nine years, Respondent grew to trust Paul Husted and to rely on him to explain important terms in Petitioners' standard form contracts. Pet. App. 8-9. In opening accounts, Petitioners routinely explained important terms in their form agreements to investors. *Id.* Petitioners did not regard their arbitration provisions as significant and did not explain them. Pet. App. 8-9.

In 1998, Respondent opened another customer account with Petitioners pursuant to their investment advice. Pet. App. 3. Petitioners presented Respondent with a signature card which was detached from the document containing the arbitration terms. The card purported to incorporate by reference the arbitration provisions contained in the separate document. Pet. App. 3-4 and 20. At Petitioners' direction, Respondent signed the detached signature card before she was provided a copy of the arbitration provisions. Pet. App. 20-21. After Respondent signed, Petitioners gave her a separate five page, single-spaced standard form document that contained the arbitration provisions and other boilerplate.

REASONS FOR DENYING THE WRIT

I. THE PETITION IS NOTHING BUT AN UNWARRANTED JUDICIAL ATTACK

Using flawed analysis of Montana law, Petitioners invite this Court to look behind the opinion in *Alice P.*

Kloss v. Edward D. Jones & Co., and Paul Husted, 2002 MT 129, 310 Mont. 123, 54 P.3d 1, and to focus on the Montana Supreme Court's (hereinafter "MSC") supposed hostility toward arbitration. Petitioners charge that the MSC applied state law in a discriminatory manner. Petitioners claim that the MSC misused principles of adhesion contract and fiduciary duty to create a new requirement that consumers be given oral notice of arbitration agreements. Petitioners argue that the MSC was motivated by an historical antagonism to arbitration. Montana law does not support their unwarranted judicial attacks.

Kloss rests on rules generally applicable to adhesion contracts, fiduciaries and waivers of constitutional and procedural rights under Montana law. The MSC did not single out arbitration agreements to create a new requirement of oral notice.

The MSC, in the concurring opinion of Justice Nelson, (in which three other justices concurred), acknowledged the *Federal Arbitration Act* 9 U.S.C. § 2 (hereinafter "FAA"), but concluded that Montana law, generally applicable to contracts, mandates that waivers of constitutional rights – jury trial and access to the courts – must be proven to have been made voluntarily, knowingly and intelligently, and will be narrowly construed. The waiver must be shown to have been deliberately and understandingly made, and the language relied upon to constitute the waiver must unequivocally and unambiguously express the waiver of the right. Absent such proof, the arbitration clause will not be enforced. Pet. App. 34-36.

Kloss decided that the manner in which Petitioners sought to secure Respondent's assent did not provide fair

notice of the arbitration provisions contained in their standard form contract.

Acceptance of Petitioners' accusations would entangle this Court in another crisis of federalism. Petitioners misinterpret the FAA and seek to immunize arbitration agreements from generally applicable requirements of state law. The FAA does not require states to accord arbitration agreements preferential treatment.

A. *KLOSS* DID NOT CREATE NEW RULES SPECIFICALLY APPLICABLE TO ARBITRATION AGREEMENTS.

Petitioners miscast the decision of the MSC in an attempt to bring it within the rubric of this Court's holding in *Doctor's Assoc., Inc. v. Casarotto,* 517 U.S. 681 (1996). They claim that the MSC created a new rule requiring oral notice of arbitration agreements because of an historical hostility toward such agreements.

Petitioners argue that the MSC ignored Montana contract law and created new rules based on a subjective analysis of Respondent's actual expectations. Pet. at 14. They assert that if the MSC had applied basic principles of contract law, it never would have reached the question whether Respondent reasonably expected Petitioners' arbitration provisions, because those provisions were not ambiguous. Pet. 15. Disregarding the MSC's opinion, Petitioners claim that the "sole reason" the MSC found Petitioners' arbitration provision outside Respondent's reasonable expectations was because the MSC "was evaluating an arbitration provision." *Id.*

In truth, the MSC did not create new rules specifically applicable to arbitration agreements. Instead, the MSC explained that "in certain circumstances, traditional assumptions associated with contract law [do not apply]" to adhesion contracts. Pet. App. 11. For example, adhesion contracts are not necessarily enforced based on their plain language regardless of what a consumer knew or understood; otherwise, "reasonable expectations" would never become an issue unless the contract was ambiguous or uncertain. Pet. App. 14-15. The MSC has consistently held (regardless of the plain language of the agreement) that an adhesion contract will not be enforced against the weaker party when it is "not within the reasonable expectations of said party." Pet. App. 11, *Iwen v. U.S. West Direct,* 1999 MT 63, 293 Mont. 512, 977 P.2d 989; *Passage v. Prudential-Bache Securities, Inc.*, 223 Mont. 60, 66, 727 P.2d 1301-1302 (1986).

Petitioners rely on a line of cases that involves construction and interpretation of terms in insurance policies. In those cases, the MSC (and U.S. District Court in Montana) refused to apply adhesion contract rules (based on the weaker party's reasonable expectations) to interpret insurance policies. Pet. 14. The MSC instead applied the general law of contract interpretation. For example, in *Counterpoint, Inc. v. Essex Ins. Co.*, 291 Mont. 189, 967 P.2d 393 (1998), the MSC held:

> Because we conclude that Counterpoint's liability insurance policy is unambiguous, we enforce it as written. Despite Counterpoint's request that we apply the reasonable expectation doctrine and rules for interpreting an adhesion contract against the insurer, we do not apply these principles here. 967 P.2d 393 at § 18.

In *Shook v. State Farm Mut. Ins. Co.*, 872 F.Supp. 768, 773 (D.Mont. 1994), the U.S. District Court explained:

> One of the major concerns which led to the evolution of the "reasonable expectations" doctrine was a desire to protect an insured, unfamiliar with the technical terms utilized in most insurance policies, from having insurance coverage diluted by application of technical and confusing policy provisions. . . . A limited number of jurisdictions have extended the doctrine to all questions of insurance coverage, whether or not ambiguities exist in the language of the contract. . . . This extension, however, appears to be the minority view. . . . In the majority of jurisdictions, the doctrine has been utilized to resolve ambiguities in insurance policies in order that the policies comport with the insureds' "reasonable expectations". . . . Well established precedent indicates Montana follows the majority position.
>
> Construction of insurance contracts in Montana is governed by the general law of contract interpretation contained in Title 28, Chapter 3, Montana Code Annotated, and the case law which has developed thereunder in the context of insurance. The Montana Supreme Court has stated that the intention of the parties to the contract is not to be inquired into unless there is ambiguity on the face of the contract. Accordingly, where the language of an insurance policy admits of only one meaning, there is no basis for interpretation of the policy coverage under the guise of ambiguity. 872 F.Supp. 773 (citations omitted).

In *Kloss,* the issue was not the interpretation or construction of the arbitration provisions. The issue was

whether those provisions were unenforceable under adhesion contract principles. Specifically, the question was whether Respondent reasonably expected that Petitioners' standard form contract contained waivers of her constitutional and procedural rights.

Most courts now refer to this issue as "procedural unconscionability." See 1 *Corbin on Contracts* § 1.4 at 2 (2002 Fall Cumulative Supp., rev. ed.); 8 *Williston on Contracts* § 18.10 at 57-68 (4th ed. 1998); *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal.4th 83, 113-114 (2001). Resolution of this issue involves consideration of all facts surrounding the formation of an adhesion contract to determine whether the weaker party had reasonable notice of the challenged provisions.[1] The analysis is not confined to a determination whether the written terms are ambiguous.[2]

In *Kloss,* the trial court (Judge Macek presiding) found that Respondent "signed [the detached card from the 1998 agreement] after being presented with documents by Donna Ferderer." Pet. App. 45, Finding #17. However, as noted to the contrary in the MSC concurring opinion of Justice Leaphart:

> I would also add that the record indicates that the detachable signature card was signed by Kloss before she was ever provided a copy of the Agreement. The branch office administrator,

---

[1] See: 7 *Corbin on Contracts* § 29.9 at 405-408 and 413-415 (2002); *Kloss v. Polske Linie Lotnicze*, 133 F.3d 164, 169 (2nd Cir. 1997); *Mathews v. New Century Mortg. Corp.*, 85 F. Supp. 2d 874, 892 (S.D. Ohio 2002).

[2] *Id.*

> Donna Ferderer testified that she filled out the Jones account number, wrote the type of registration of the account and tore the detachable card out of the brochure. Ferderer testified that, "I gave it to Alice and told Alice I need her signature right here. . . . " Ferderer then took the form back, gave Kloss the disclosure statement, advised her that "these are the terms and conditions of opening up an Edward D. Jones account, keep these for your records. . . . "
>
> . . . Reasonable expectations are, by their very nature, prospective; they are defined *before* one enters into a contract, not after. Pet. App. 20-21 (emphasis is Justice Leaphart's).

Based upon Petitioners' procedure, Respondent understood that she was opening an account, but she was unaware of the arbitration provisions. The MSC considered the parties' relative bargaining positions[3] and nine year course of dealing in determining Respondent's reasonable expectations. Pet. App. 14 and Pet. 6-7.[4]

Over time, the parties understood that Respondent did not read Petitioners' form contracts and instead relied on Petitioners to explain important terms. *Id.* The MSC concluded that Petitioners' arbitration provisions were "important terms" because they included waivers of Respondent's constitutional and procedural rights. *Id.*

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[3] I.e., an elderly widow with a relative lack of sophistication and bargaining power. See: Pet. App. 3 and 23.

[4] Courts routinely consider a weaker party's course of dealing to determine whether adhesive terms were outside actual and reasonable expectations. See: *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 820-821 (1981).

Relying on the parties' course of dealing and relative bargaining strength, the MSC concluded that Respondent did not reasonably expect that Petitioners would require her to waive her constitutional and procedural rights without explanation.

Far from providing an explanation, Petitioners had Respondent sign a detachable signature card waiving her rights **before** presenting the arbitration provisions. Pet. App. 20-21. As Justice Leaphart's concurring opinion emphasized, reasonable expectations should be defined *before* one enters into a contract, *not after*. Pet. App. 21.

The cases relied upon by Petitioners demonstrate that the MSC does not apply adhesion contract law to the construction and interpretation of insurance policies. Pet. 14. None of those cases involved the issue decided in *Kloss:* whether an adhesion contract term was unenforceable because it was beyond the reasonable expectation of the weaker party. None of Petitioners' cases involve facts relating to the formation of the contracts remotely similar to the parties' course of dealing in *Kloss* – e.g., there was no indication that insurance brokers in those cases routinely explained important terms in their policies to new policyholders. Pet. App. 14.

At most, Petitioners have shown that the MSC, along with a majority of state courts, do not apply adhesion contract analysis to interpret insurance policies. It is not the purpose of the FAA, however, to have this Court ensure that Montana uniformly applies adhesion contract principles to the construction of insurance policies as well as to the enforcement of arbitration agreements, especially since insurance policies typically do not incorporate waivers of constitutional and procedural rights.

Most importantly, Petitioners have not established that the MSC applied Montana's law of adhesion contracts in a way that discriminated against Petitioners' arbitration agreement. Adhesion contract rules are generally applicable under the Montana commercial code. See *All State Leasing v. Top Hat Lounge*, 198 Mont. 1, 649 P.2d 1250 (1982). Indeed, in two prior cases, the MSC upheld arbitration provisions in stock brokers' form agreements against challenges under adhesion contract rules. *Passage, supra*, and *Chor v. Piper Jaffray & Hopwood*, 261 Mont. 143, 862 P.2d 26 (1993). And, in *Chor*, the MSC held that the arbitration provisions were clearly within a customer's actual expectations because she testified that she had reviewed and understood the contract. *Chor*, *supra*, at 261 Mont. 143, 149.

B. KLOSS PROPERLY APPLIED MONTANA LAW GOVERNING FIDUCIARY DUTIES THAT DID NOT DISCRIMINATE AGAINST PETITIONERS' ARBITRATION AGREEMENT.

Petitioners base their argument on a single, older case that is inapposite, *Brown v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 197 Mont. 1, 640 P.2d 453 (1982). The MSC held that Merrill, Lynch had no duty to bring a liquidation clause to an investor's attention. There was no contention that a fiduciary relationship was created when the customer agreement was formed. The facts surrounding contract negotiations were not even mentioned in *Brown*; hence, the MSC presumed the contract was an arm's length transaction. *Brown*'s only significance is that it contains a liquidation clause similar to Petitioners'.

The opinion in *Brown* is consistent with *Kloss*. *Kloss* does not hold that Petitioners had a duty to explain their liquidation clause. In *Kloss*, the MSC affirmed precedent that there was fiduciary duty in every broker customer relationship, and held that the scope of the duty in this case required Petitioners to explain the arbitration provisions based on the parties' prior course of dealing, and because Petitioners had discretion to buy and sell in Respondent's account. Pet. App. 17.

As fiduciaries, Petitioners should have explained the arbitration clause because it waived Respondent's constitutional and procedural rights. Pet. App. 18; 7 *Corbin on Contracts*, *supra*, at 412. The case relied upon by the MSC for finding a fiduciary relationship, *Chor, supra,* was decided eleven years after *Brown*. The fact that the MSC did not find a fiduciary duty in *Brown* when no party raised the issue is neither relevant nor a reason for finding *Kloss* ironic.

Petitioners' contention that the MSC created unique requirements for arbitration agreements by applying the law of fiduciary duty in this case is specious. Ten years ago, the MSC recognized that stock brokers could be fiduciaries if they have discretion to trade in a customer's account. *Chor, supra.* In *Kloss*, the MSC properly applied that principle because the parties' course of dealing supported it, not because the case involved an arbitration agreement.

II. *KLOSS* DOES NOT CONFLICT WITH THE FAA.

In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474

(1989), this Court held that one of the fundamental tenets of the FAA is that arbitration provisions should exist "upon the same footing" as all other contractual provisions. Evaluating arbitration agreements pursuant to federal law while evaluating all other contractual provisions pursuant to state law would place an arbitration provision on footing different from the rest of the contract; the arbitration provision would receive preferential treatment. See *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 137 (4th Cir. 1979). Arbitration provisions contained in adhesion contracts, like all other contractual provisions contained in adhesion contracts, are subject to the state's adhesion contract laws. See *Doctor's Assoc., Inc., supra*, at 687; *Chor, supra*, 261 Mont. at 148, 862 P.2d at 29; see also 9 U.S.C. § 2 (1998).

Petitioners argue that under the FAA, arbitration agreements may not be subject to general defenses under state law if those defenses turn on the fact that arbitration agreements necessarily entail waiver of constitutional and procedural rights. Pet. 21-22.

This argument directly conflicts with this Court's consistent holding that "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening [§ 2 of the FAA.]" *Doctor's Associates, supra*, at 687 citing *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 281 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-84 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987). In *Allied-Bruce*, this Court stated that the FAA preempts state laws that are applicable "only to arbitration provisions." 513 U.S. 281. That is not the case

in *Kloss*, which applies "principles of Montana law generally applicable to all contracts." *Id.*, at 54 P.3d 1, 17 ¶ 76 (Pet. App. 36).

Secondly, Petitioners' argument rests on a false premise. Non-binding arbitration agreements do not require waiver of constitutional and procedural rights. Such waivers are not essential elements of all pre-dispute arbitration agreements. However, all contracts that contain such waivers are subject to strict scrutiny under Montana law, whether or not they require arbitration. *Id.*; *May v. Figgins*, 186 Mont. 383, 394, 507 P.2d 1132, 1138 (1980).

The Alabama Supreme Court's opinion in *Ex Parte McNaughton*, 728 So.2d 592 (Ala. 1998) is wrong. *McNaughton* held the *FAA* precludes state courts from invalidating arbitration agreements as unconscionable because they involve waivers of constitutional and procedural rights. *McNaughton* held that such an approach would assign a suspect status to arbitration agreements in violation of the *FAA*. Pet. 21-22. The employment contract in *McNaughton* required employees to arbitrate their claims while allowing the employer to retain its judicial options.

In *Armendariz v. Foundation Health Foundation Psychcare Services, Inc., supra*, the California Supreme Court rejected *McNaughton*'s notion that requiring mutuality in an adhesive arbitration contract imposes a suspect status on arbitration agreements. *Armendariz*, 24 Cal. 4th 119-120. The Court stated:

> . . . it does not disfavor arbitration to hold that an employer may not impose a system of arbitration on an employee that seeks to maximize the

> advantages and minimize the disadvantages of arbitration for itself at the employee's expense. Id., 24 Cal. 4th at 120.

In other words, arbitration agreements are not necessarily unilateral.

Kloss did not impose a suspect status on arbitration agreements per se. It requires a stronger party to give fair notice if it knows that a weaker party does not reasonably expect that she is waiving constitutional and procedural rights. It requires a fiduciary to give fair notice if he is requiring another with whom he is in a relationship of trust to waive her constitutional and procedural rights. These principles apply to all adhesion and fiduciary contracts seeking certain waivers whether or not they require arbitration. The MSC did not invalidate the contract provisions in *Kloss* because they required arbitration. The recent decision of the Ninth Circuit in *Ting v. AT&T*, docket no. 15416 (9th Cir. Slip Op. 2/11/03), makes the pertintent point at footnote 16:

> If the district court indicated any hostility, it was not directed at arbitration, but at the manner in which it was forced upon consumers . . . The decision is hostile to the adhesive and oppressive nature of [the agreement] not to the particular forum . . . More importantly, the Supreme Court's general statements on arbitration do not override the FAA's particular rule which obtains here and is well settled: "Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening [9 U.S.C.A.] § 2". *See Doctor's Assoc.* [*supra*].

Similarly, the MSC invalidated the Petitioners' contract because the circumstances under which Petitioners tried to secure Respondent's assent did not provide her reasonable notice of the arbitration provisions, i.e., it was "beyond her reasonable expectations" and not because of hostility to arbitration. Pet. App. 20-21, 23-24 and 32-33.

III. *KLOSS* DOES NOT RAISE ISSUES OF NATIONAL IMPORT.

Kloss rests on the particular facts surrounding the parties' nine year course of dealing and Petitioners' peculiar practice of having Alice Kloss sign an agreement before presenting the agreement to her. It does not apply generally to pre-dispute arbitration agreements, whether or not those agreements call for binding arbitration. It does not purport to affect fiduciary relationships outside Montana. Therefore, it does not apply generally to broker accounts outside Montana.

A. *GREEN TREE* HAS NO RELATION TO *KLOSS*.

Petitioners assert, without explanation, that in deciding *Green Tree Financial Corp v. Bazzle,* docket no. 02-634 (cert. granted 1/10/03), this Court is likely to address issues relevant to their petition. Pet. 27-29. Petitioners claim that their petition requires this Court to decide whether state courts have the power to substitute their notions of fairness in protecting constitutional rights at the expense of the parties' arbitration agreement. Pet. 28. That is untrue.

The issue is whether state courts have the power to refuse to enforce arbitration agreements under state laws

of general application. This Court has consistently held that they do. *Green Tree* does not involve that issue, but rather whether arbitration is applicable in class actions.

CONCLUSION

The petition for writ of certiorari should be denied.

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No. 02-1112

In the Supreme Court of the United States

EDWARD D. JONES & CO., L.P., D/B/A EDWARD JONES, AND PAUL HUSTED,

Petitioners,

v.

ALICE P. KLOSS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Montana

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Chamber of Commerce of the United States respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the petitioners. The petitioners have consented to the filing of the brief, and their written consent has been filed with the Clerk; the respondent, however, has refused to consent to the filing of the Chamber's brief.

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

Many of the Chamber's members have found that arbitration allows them to resolve disputes promptly and efficiently, while avoiding the costs associated with traditional litigation. Accordingly, many of these interstate businesses routinely include arbitration provisions in their contracts. Because some Chamber members can be sued in virtually any state, they rely on the protection afforded by the Federal Arbitration Act ("FAA") to ensure that their arbitration agreements are enforced in spite of the vagaries and preferences of the judiciaries of individual states.

The Chamber's members have observed that the courts of some states have become increasingly willing to strike down arbitration clauses based on rules that ostensibly derive from the common law but are fashioned specifically to address arbitration agreements. The decision below exemplifies this trend: the Supreme Court of Montana refused to enforce a clear and prominently displayed arbitration clause, which indisputably had been signed by the plaintiff, on the ground that the defendants had not pointed out the provision and explained its significance and effect. The court purported to render its decision under common law rules applicable to all contracts, but in fact it invented from whole cloth a special notice requirement for arbitration clauses. If federal law permits courts freely to impose such newly-minted requirements on arbitration, then the ability of businesses to contract for alternative dispute resolution procedures will become illusory. Accordingly, the Chamber has a strong interest in encouraging this Court to review, and reverse, the decision below.

For the foregoing reasons, the motion of the Chamber of Commerce of the United States to file the accompanying brief as *amicus curiae* in support of Petitioners should be granted.

Respectfully submitted.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the preceding motion for leave to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Montana Supreme Court has held that an otherwise valid arbitration provision, signed by the respondent after she had an opportunity to review the contract, is unenforceable because the petitioners did not orally highlight and explain the arbitration provision. Although the court said that it was applying the state common law rules that govern all contracts of adhesion, nothing about the opinion suggests that the court would apply this "oral notice" requirement to any other sort of contract term. Indeed, in holding that the arbitration clause was not within the respondent's reasonable expectations, the court was moved principally by the key feature of all such provisions – *i.e.*, that by agreeing to arbitrate respondent waived her right to a jury trial and to access to the courts. The concurring opinion filed by Justice Nelson, which was joined by all of the other justices in the majority, makes especially clear that the court was moved by its view that heightened notice standards should apply to arbitration agreements because they necessarily involve the waiver of constitutional rights.

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[1] This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

Section 2 of the Federal Arbitration Act ("FAA") provides that "a written provision in * * * a contract * * * to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As this Court has made clear, the role of state law in determining the enforceability of an arbitration clause, while significant, is carefully circumscribed by the FAA. Although an arbitration provision may be invalidated under state law for reasons that would apply equally to the other terms of the contract, "the uniqueness of an agreement to arbitrate" may not be raised as grounds for its invalidation under state law. *Perry* v. *Thomas*, 482 U.S. 483, 492 n.9 (1987). The Montana Supreme Court's decision plainly runs afoul of this limitation; indeed, this Court has already held that the Montana legislature could not impose by statute special notice requirements for arbitration of the sort that the court below has mandated.

This case is a particularly clear example of a burgeoning trend among certain courts to invalidate arbitration agreements based on state-law rules that are described under the rubric of general contract law, but in fact have been fashioned solely to deal with arbitration agreements. These decisions threaten to make the validity of arbitration agreements entirely a matter of the various courts' ad hoc articulations of state law, diluting the strong federal policy favoring the private ordering of dispute resolution. This case provides the Court with a perfect vehicle to begin to explain the appropriate role of state common law in determining the validity of contractual arbitration clauses.

ARGUMENT

A. The Montana Supreme Court's Decision Reflects That Court's Hostility To Arbitration Agreements

The Montana Supreme Court's decision is a classic example of judicial hostility to arbitration, expressed through the discriminatory application of state common law. The court purported to apply the state-law principles that govern *all* contracts. In fact, however, its refusal to order Kloss to abide by the arbitration agreement that she signed reflected the court's distaste for arbitration – in particular, the fact that by agreeing to arbitrate individuals give up their rights to the judicial resolution of their claims.

In invalidating the arbitration provision in Kloss's contract with Edward Jones, the Montana Supreme Court purported to apply "generally applicable contract law defenses" (Pet. App. 16) – in particular, those concerning contracts of adhesion. According to the court:

> Contracts of adhesion arise when a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms. * * * [S]uch a contract * * * will not be enforced against the weaker party when it is (1) not within the reasonable expectations of said party or (2) within the reasonable expectations of the party, but, when considered in its context, is unduly oppressive, unconscionable, or against public policy.

Id. at 12 (quoting *Passage* v. *Prudential-Bache Securities, Inc.*, 727 P.2d 1298, 1302 (Mont. 1986)).

Finding that the contract between Edward Jones and Kloss was one of adhesion (Pet. App. 13), the court invali-

dated the arbitration provision because it determined that the provision was "clearly not within Kloss's reasonable expectations." *Id.* at 14. The court's basis for that finding was merely that Kloss's broker "did not explain the arbitration provision (a provision by which Kloss waived at least two constitutional rights, *i.e.*, a right of access to the courts pursuant to Article II, Section 16, and her right to a jury trial pursuant to Article II, Section 26 of the Montana Constitution) to Kloss." *Ibid.*

In finding that the agreement was not within Kloss's reasonable expectations, the court did not consider *any* of the factors one might expect to be part of that analysis – for example, whether Kloss was generally familiar with arbitration provisions; whether she had prior experience in dealing with brokerage contracts; whether she was aware that some such contracts contain arbitration clauses; whether such provisions are ubiquitous in the industry; or whether an individual in Kloss's position would be surprised by having to submit to an arbitrator the type of dispute at issue. Instead, the court appeared to be moved solely by its view that "Kloss waived her right of access to this State's courts, her right to a jury trial, her right to reasonable discovery, her right to findings of fact based on the evidence, and her right to enforce the law applicable to her case by way of appeal." *Ibid.* Thus, the decision turned *solely* on the fact that arbitration, by its very nature, proceeds outside the court system. Indeed, the decision can be read to adopt a rule that *no* arbitration provision can be enforced against an individual who chooses not to read a standard form contract, unless the offerer specifically points out and explains the provision before the contract is signed.

The discomfort with arbitration that underlies the court's decision was more fully laid bare in Judge Nelson's concurrence, which was joined by every one of the Justices in the majority. Judge Nelson wrote his concurrence to "further

develop" what he called the "additional rationale supporting our decision in this case – *i.e.*, *whether Kloss effectively waived her rights to a trial by jury and to access to the courts* * * *." *Id.* at 22 (emphasis added).[2]

Justice Nelson posited that the "constitutionally guaranteed right of a jury trial is 'fundamental' and, therefore, deserving of the highest level of court scrutiny and protection." *Id.* at 25. "Given the sacredness and inviolability of the fundamental right to trial by jury," he concluded, "any contract provision that openly or subtly causes the forfeiture of the exercise of this right must be rigorously examined by the courts." *Id.* at 26. He found, further, that "the right of access to the courts must be protected as the fundamental constitutional right it is." *Id.* at 28-29.

Justice Nelson made no secret of his disapproval of the arbitration agreements that interfere with these "fundamental rights." In his view, the inclusion of an arbitration clause in a standard form contract "is at one and the same time an 'open attack' on the right of jury trial and a 'secret machination' causing forfeiture of the right that Blackstone predicted would 'sap and undermine' the right, and with that our 'public and private libert[ies].'" *Id.* at 26 Indeed, he professed dramatically that "large national and multi-national corporations are effectively privatizing an important segment of the civil justice system in this country by including fine-print,

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[2] Justice Nelson added that "other constitutional rights may be implicated in these sorts of cases, including the right to due process of law * * * and equal protection. Moreover, as our Opinion points out, arbitration results in loss of certain procedural rights such as the right to engage in discovery and the right to have the admissibility of evidence judged under the Montana Rules of Evidence. Additionally, the right to judicial review of arbitration decisions is severely restricted – *i.e.* effectively there is no right of appeal from these decisions." Pet. App. 22 n.1

non-negotiable, take-it-or-leave-it, mandatory, binding arbitration clauses in their standard-form contracts." *Id.* at 29.

Justice Nelson continued that, "where fundamental constitutional rights are involved * * * the law is eminently clear that the waiver of such rights will not be lightly presumed." *Id.* at 31. Thus, despite the undisputed findings that the arbitration clause appeared on the second page of the contract in boldface type and was referenced again in a boldface notice immediately above the signature line, that Kloss had the opportunity to read the contract before she signed it, and that she would have understood the arbitration provision had she read it (*id.* at 46), Judge Nelson found that "there is no evidence to support a conclusion that Kloss knowingly and intelligently waived her rights to trial by jury and access to the courts." *Id.* at 32. On this ground, he and the other justices in the majority (all of whom joined his concurring opinion) found that the arbitration clause was unenforceable.

B. The Montana Supreme Court's Decision Is Inconsistent With This Court's Decisions Construing Section 2 Of The FAA

In enacting the FAA, Congress "declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1994). The Act's "basic purpose" is "to put arbitration provisions on 'the same footing' as a contract's other terms." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 275 (1995) (quoting *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Accordingly, Section 2 of the FAA "embodies a clear federal policy of requiring arbitration unless the agreement to arbitrate * * * is revocable 'upon such grounds as exist at law or in equity for the revocation of any contract.'" *Perry*, 482 U.S. at 489 (quoting 9 U.S.C. § 2). Unless that savings clause

applies, "[a]n agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law.*" *Id.* at 492 n.9 (1987) (emphasis in original).

Section 2 of the FAA carves out a limited role for the states in the regulation of contractual arbitration. An agreement to arbitrate may be invalidated on state law grounds "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 493 n.9 (emphasis in original). Accordingly, Section 2 gives the States, for example, "a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision." *Allied-Bruce*, 513 U.S. at 281. However, "[a] state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2." *Perry*, 482 U.S. at 493 n.9. "Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what * * * the state legislature cannot." *Ibid.*

In sum, as this Court has ruled:

> What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress' intent.

Allied-Bruce, 513 U.S. at 281.

The Court recently applied these principles to invalidate a Montana statute requiring that "[n]otice that [the] contract is subject to arbitration" be "typed in underlined capital letters

on the first page of the contract." *Doctor's Associates Inc.* v. *Casarotto*, 517 U.S. 681, 683 (1996) (quoting Mont. Code Ann. § 27-5-114(4) (1995)). The Court reiterated that, in the FAA, "Congress precluded States from singling out arbitration provisions for suspect status." *Id.* at 682. Montana's first-page notice requirement was impermissible under Section 2 because the requirement "governs not 'any contract,' but specifically and solely contracts 'subject to arbitration.'" *Ibid.* Put another way, "state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is pre-empted" by the FAA. *Id.* at 687 (quoting 2 I. MacNeil, R. Speidel, T. Stipanowich and G. Shell, FEDERAL ARBITRATION LAW § 19.1.1, at 19:4-19:5 (1995)).

In the decision below, the Montana Supreme Court has used the cloak of the common law to do precisely what this Court ruled that the Montana legislature may not do by statute: it has "condition[ed] the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally." *Casarotto*, 517 U.S. at 687. Notably, the court did not rule that *all* significant contract provisions must be explained to a person in Kloss's position. The court's decision to invalidate the provision instead "singl[ed] out arbitration provisions for suspect status" (*id.* at 682), turning on the fact that, in agreeing to arbitrate, Kloss "waived at least two constitutional rights" under State law. Pet. App. 14.[3] The concurrence of Justice Nelson – a diatribe

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[3] As many federal courts have held, the fact that an arbitration agreement constitutes a waiver of the Seventh Amendment right to a jury trial does not provide a basis upon which to invalidate the agreement. See, *e.g.*, *Dillard* v. *Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148, 1155 n.12 (5th Cir. 1992) ("the Seventh Amendment does not preclude 'waiver' of the right to jury trial through the signing of a valid arbitration agreement").

against the use of arbitration clauses in standard form contracts that was joined by *all* of the justices in the majority – makes it even more clear that the decision was motivated by hostility to arbitration, not by general common law principles that govern the enforceability of all contracts.[4]

It is no answer to say that the court would have applied its rule even-handedly to *any* contract provision effecting a waiver of fundamental rights. The FAA permits the states to invalidate arbitration provisions *only* by employing principles that apply to "contracts *generally*." *Casarotto*, 517 U.S. at 688 (emphasis added). Thus, Montana's discriminatory requirement is not immunized from pre-emption simply because it can be framed in terms that theoretically might encompass some contract provision other than an arbitration clause. Because the decision below undoubtedly "places arbitration agreements in a class apart from 'any contract,' and singularly limits their validity," the rule approved by the Montana Supreme Court is "inconsonant with, and is therefore pre-empted by, the federal law." *Id.* at 688.

The Montana Supreme Court's error is a grave one that threatens to substantially undermine the FAA's policy favoring arbitration. First, the decision will cast into doubt the enforceability of the arbitration clauses in an untold number of existing contracts in Montana. The many trial attorneys who dislike arbitration clauses will seize upon the decision

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[4] This Court's decisions do not suggest that standard form agreements signed by consumers are any less entitled to protection under Section 2 than are individually negotiated agreements. See, *e.g.*, *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265 (1995) (upholding arbitration clause in contract between termite control company and homeowner). Indeed, the Court observed in *Allied-Bruce* that "arbitration's advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation." *Id.* at 280.

below – which could be used to contest the enforceability of any arbitration clause, no matter how prominently disclosed, in virtually any standard-form contract – as a ground for avoiding arbitration.[5] Even in the event that some of the many existing arbitration agreements were explained orally to those signing them, companies are unlikely to have retained records of those discussions. With the Montana Supreme Court having articulated no obvious limits on its holding, *all* arbitration provisions governed by Montana law that were *not* the subject of specific negotiations by the parties will be up for grabs.[6]

Second, companies trying to enter into enforceable arbitration provisions in the future will be forced to assume substantial new burdens. To satisfy the Montana Supreme Court's requirements, they will have to adopt procedures to orally disclose and explain to each person who signs an arbitration agreement the effect and significance of the provision. They will have to be careful what they say: the oral statements of the party proposing an arbitration clause have been

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[5] Indeed, trial attorneys are keenly aware that state contract law provides fertile ground for avoiding enforcement of arbitration agreements. See, *e.g.*, David G. Wirtes, *Suggestions for Defeating Arbitration*, 24 AM. J. TRIAL ADVOC. 111, 138 (Summer 2000) (describing the "factors [counsel should] look for when attempting to establish that [an arbitration] agreement would be unconscionable if enforced against your client").

[6] Much was made below of the fact that the respondent is "a 95-year old widow." Pet. App. 18. But there was no finding that Mrs. Kloss lacked mental acuity, was financially vulnerable, or was particularly unsophisticated. Nor was it shown that arbitrating her claim (which surely would have been more expeditious) rather than litigating it would have been particularly disadvantageous to her. Certainly, the court's decision did not turn on any such specific facts.

cited as grounds for *invalidating* the agreement. See *Mendez* v. *Palm Harbor Homes, Inc.*, 45 P.3d 594, 602 (Wash. App. 2002) (fact that sales representative told the plaintiff that "arbitration would be cheaper and more convenient" contributed to the finding that an arbitration agreement was unconscionable). Moreover, they will have to employ significantly more onerous and expensive record-keeping practices: with a signed arbitration agreement now insufficient in Montana to demonstrate the parties' agreement to arbitrate, a company seeking to enforce its arbitration agreements also will have to keep detailed and verifiable records of the oral conversations that accompany the signing of these contracts.

This Court having ruled in *Casarotto* that the Montana legislature could not require that "[n]otice that the contract is subject to arbitration" be "typed in underlined capital letters on the first page of the contract" (517 U.S. at 683), it is inconceivable that the Montana courts, purporting to apply their common law, may impose far more extensive notice requirements. Review by this Court clearly is warranted to ensure that a new strand of the common law, developed solely to give expression to some courts' continued suspicion of arbitration, does not interfere with the FAA's principles.

C. The Decision Below Is Part Of A Growing Trend To Invalidate Arbitration Agreements On State Common Law Grounds That Apply Only to Such Provisions

The Montana Supreme Court is not alone in refusing to enforce an arbitration clause by applying a common law principle fashioned particularly to express the court's discomfort with arbitration. As a presenter at the annual meeting of a prominent association of trial lawyers recently noted, "courts seem to be increasingly willing to refuse to enforce arbitration agreements on standard contractual grounds." Jean S. Sternlight, *The Basic Structure of the FAA: Possible*

Challenges to Arbitration Agreements, 2 ANN. 2000 ATLA CLE 2211 (2000). These courts, purporting to apply only "such grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. § 2), are fashioning a new body of law imposing a host of procedural and substantive requirements on arbitration. Although the cases often are decided under principles having familiar names – most often they purport to apply the doctrine of unconscionability – the decisions depend on considerations that are peculiar to arbitration agreements and reflect the judges' views that arbitration disfavors the "weaker" party.

For example, many arbitration agreements have been held to be unconscionable because they fail some *ad hoc* test of mutuality. See, *e.g.*, *Iwen* v. *U.S. West Direct*, 977 P.2d 989 (Mont. 1999) (arbitration clause between yellow pages publisher and purchaser of advertisement was unconscionable because it allowed the publisher to sue in court to collect payments under the contract). In some cases, courts have found arbitration agreements to be unconscionable on the ground that they suffer from non-mutuality even when the agreements are facially neutral. See *Mercuro* v. *Superior Court*, 116 Cal. Rptr. 2d 671, 679 (Cal. Ct. App. 2002) (neutral provision specifying arbitration forum contributed to finding of unconscionability because the "repeat player effect" rendered the provision disadvantageous to the "weaker party"); *Szetela* v. *Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal Ct. App. 2002), cert. denied, __ S. Ct. __ (2003) (mutual prohibition on class actions was "manifest[ly] one-sided[]" and therefore substantively unconscionable "because card companies typically do not sue their customers in class action lawsuits"); *Luna* v. *Household Fin. Corp. III*, 236 F. Supp. 2d 1166, 1180 (W.D. Wash. 2002) (holding that facially neutral confidentiality provision in arbitration agreement unfairly disadvantaged consumers and accordingly was unconscionable, after noting "[t]he advantages repeat participants pos-

sess over 'one time' participants in arbitration proceedings"); *ACORN* v. *Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1172 (N.D. Cal. 2002) (same). But other courts have recognized that the "application of any state law principle establishing a mutuality requirement for arbitration clauses stricter than that governing other contract clauses would violate the FAA." 2 I. MacNeil, *et al.*, *supra*, § 17.4.2; see, *e.g.*, *Ex Parte McNaughton*, 728 So. 2d 592, 598 (Ala. 1998) (holding that it was improper to apply the non-mutuality doctrine to an arbitration clause where it rested on the concern that the agreement causes one party to "waiv[e] his right to a remedy by due process of law * * * and his right to trial by jury").

Other courts, like the Montana Supreme Court in the decision below, have refused to recognize in the case of arbitration clauses the forms of offer and acceptance that they have found sufficient to make enforceable the other terms and conditions of consumer contracts. See, *e.g.*, *Long* v. *Fidelity Water Sys., Inc.*, 2000 WL 989914, *3 (N.D. Cal. May 26, 2000); *Badie* v. *Bank of America*, 79 Cal. Rptr. 2d 273, 277-278 (Cal. Ct. App. 1998); *Powertel, Inc.* v. *Bexley*, 743 So. 2d 570, 575 (Fla. Dist. Ct. App. 1999); *Mattingly* v. *Hughes Elec. Corp.*, 2002 WL 31444472, *7-*8 (Md. Ct. Spec. App. Nov. 4, 2002). In *Powertel*, for example, the Florida court held that an arbitration clause in a customer's contract with a cellular telephone service provider was unenforceable because, among other things, "Powertel should have given a more prominent notice of such an important change." 743 So. 2d at 575. The courts imposing such special notice requirements often insist that they are necessary because the customer must be alerted that "he or she is waiving an important constitutional right." *Badie*, 79 Cal. Rptr. 2d at 805. In contrast, other courts applying this Court's decisions have deemed Section 2 of the FAA to be "inconsistent with any requirement that an arbitration clause be prominent." *Hill* v. *Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997)

(enforcing arbitration clause after noting that the "[t]erms inside Gateway's box stand or fall together"); see also *Green Tree Fin. Corp.* v. *Vinston*, 753 So. 2d 497, 502 (Ala. 1999) (burden is on customer to read what he or she signs; defendant had no duty "to disclose, or explain, the arbitration clause to the Vinstons"); *EZ Pawn Corp.* v. *Mancias*, 934 S.W.2d 87, 90 (Tex. 1996) ("We presume a party * * * who has the opportunity to read an arbitration agreement and signs it, knows its contents.").

Under the rubric of unconscionability, moreover, some courts have refused to enforce arbitration clauses in which the parties agree to waive punitive damages. See, *e.g.*, *State of West Virginia ex rel. Dunlap* v. *Berger*, 567 S.E.2d 265, 279-280 (W. Va. 2002); *Ex Parte Thicklin*, 824 So. 2d 723, 733 (Ala. 2002). Other courts have concluded that arbitration agreements that do not permit the arbitrator to entertain class actions are unconscionable, and thus unenforceable. See, *e.g.*, *Ting* v. *AT&T*, 2003 WL 292296, at *20 (9th Cir. Feb. 11, 2003); *ACORN*, 211 F. Supp. 2d at 1172; *Mandel* v. *Household Bank*, 29 Cal. Rptr. 380, 386 (Cal. Ct. App. 2003) (applying Nevada law); *Powertel*, 743 So. 2d at 576; *Luna*, 236 F. Supp. 2d at 1182-1183; *Dunlap*, 567 S.E.2d at 279-280.[7]

Courts applying California law have been particularly aggressive in imposing both substantive and procedural limitations on arbitration clauses. See *Ting*, 2003 WL 292296, at *20-*21 (holding that three aspects of the arbitration agreement between AT&T and its customers were unconscionable under California law). The California courts justify the im-

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[7] The Chamber recently filed an amicus brief in support of the petitioner in *Green Tree Financial Corp.* v. *Bazzle*, No. 02-634, arguing that arbitration agreements that do not permit the arbitrator to award punitive damages should not be considered unconscionable.

position of these arbitration-specific rules on the theory that "the ordinary principles of unconscionability may manifest themselves in forms peculiar to the arbitration context." *Armendariz* v. *Foundation Health Psychcare Servs., Inc.*, 6 P.3d 669, 693 (Cal. 2000). Yet these decisions appear to be premised, not on the principles of contract law that are applicable to all contracts, but on the courts' view that arbitration is an inferior forum for the vindication of a party's rights.

In *Armendariz*, for example, the court invalidated an arbitration agreement for lack of mutuality after observing that the "perceived advantages of the judicial forum for plaintiffs include the availability of discovery and the fact that courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to 'split the difference' between the two sides, thereby lowering damages awards for plaintiffs." *Ibid.* Such general suspicion of arbitration permeates the decisions of courts applying California law – including the Ninth Circuit. See, *e.g.*, *Three Valleys Mun. Water Dist.* v. *E.F. Hutton & Co.*, 925 F.2d 1136, 1141 (9th Cir. 1991) ("Before a party to a lawsuit can be ordered to arbitrate and thus *be deprived of a day in court*, there should be an express, unequivocal agreement to that effect.") (emphasis added); *Szetela*, 118 Cal. Rptr. 2d at 868 (agreement requiring individual arbitration of claims "*prohibit[s] any effective means of litigating Discover's business practices*" and grants Discover a "'get out of jail free' card while compromising important consumer rights") (emphasis added); *Badie*, 79 Cal. Rptr. 2d at 801 ("by agreeing to a unilateral change of terms provision," customers could not have "intended to give the Bank the power in the future to *terminate [their] existing right to have disputes resolved in the civil justice system, including their constitutionally based right to a jury trial*") (emphasis added). It is exceedingly hard to credit the view that these courts are applying "such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

* * *

We by no means deny that state contract law has a role to play in determining whether an arbitration agreement is enforceable – just as state law determines whether the parties are bound by contract terms regarding price, warranties, conditions of sale, and similar matters. However, Congress plainly did not intend to authorize courts to employ ad hoc interpretations of state law for purposes of frustrating agreements to arbitrate. Guidance from this Court with respect to the appropriate role of state common law in determining the enforceability of arbitration agreements is acutely needed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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In The Supreme Court of the United States

EDWARD D. JONES & CO., L.P. d/b/a EDWARD JONES, AND PAUL HUSTED,

Petitioners,

v.

ALICE P. KLOSS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Montana

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The United States Supreme Court has previously stricken statutory limitations on enforcement of arbitration agreements. This case presents the appropriate vehicle for the Court to determine whether the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, also prohibits courts from applying common law principles in a manner that allows them to accomplish that which the state legislature cannot. The Montana Supreme Court has enunciated a state policy conditioning enforcement of arbitration agreements contained in adhesion contracts on the oral explanation of the arbitration provision. The Montana Supreme Court refused to enforce the parties' agreement because the agreement at issue was an arbitration agreement which necessarily waived certain state constitutional rights. In fact, Respondent concedes as much on page six of her Opposition when she notes that the question resolved by the court below was "whether Respondent reasonably expected that Petitioners' standard form contract contained waivers of her constitutional and procedural rights." The FAA, however, prohibits states from creating such obstacles to the enforcement of arbitration agreements, whether cloaked in terms of the common law or enumerated in a statute.

I. THIS CASE CONCERNS THE PREEMPTIVE SCOPE OF THE FEDERAL ARBITRATION ACT.

Despite the misplaced focus of Respondent's Opposition, this case is not about the correctness of the Montana Supreme Court's interpretation of its law on adhesion contracts and fiduciary duty. The Montana Supreme Court has the power to establish its common law. Under the Supremacy Clause, however, a state court may not interpret

its law in a manner that conflicts with federal law. U.S. Const. art. VI, § 2, cl. 2. This Court has long recognized that through the FAA, Congress declared "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The issue in this case is whether a conflict exists between this federal policy embodied in Section 2 of the FAA, 9 U.S.C. § 2, and the decision below.

This Court has held that the FAA preempts state *statutes* that limit enforceability of arbitration agreements on grounds not applicable to contracts generally. *See e.g.*, *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (striking down a Montana statute requiring specific written notice of arbitration clause on first page of contract); *see also, Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 282 (1995); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). As state statutes no longer provide a basis for invalidating arbitration clauses, courts have now turned to the common law to maintain their hostile treatment of arbitration agreements. However, this Court has warned that courts may not "construe [arbitration] agreement[s] in a manner different from that in which it otherwise construes nonarbitration agreements." *Perry*, 482 U.S. at 492 n.9; *accord Doctor's Assoc.*, 517 U.S. at 687; *Allied-Bruce Terminix*, 513 U.S. at 282. Courts may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." *Perry*, 482 U.S. at 492 n.9.

Despite these warnings, the Montana Supreme Court created an oral notice requirement for the enforcement of arbitration agreements because these agreements necessarily encompass a waiver of the state constitutional rights of access to courts and trial by jury. Respondent claims that the Montana Supreme Court did not rely on the unique qualities of arbitration agreements in its analysis, repeatedly noting that the Court was only analyzing the reasonableness of Kloss' waiver of her constitutional and procedural rights. (Rep't Opp'n Br. at 2, 6-7, 14.) This is a distinction without a difference. By its very nature, an agreement to arbitrate requires the parties to forego these same constitutional and procedural rights in favor of an alternative forum.

There is no doubt that the Montana Supreme Court fashioned its analysis of the parties' arbitration agreement based on the fact that an arbitration agreement was at issue. The Montana Supreme Court determined that oral explanation of the arbitration provision was necessary because the provision effectuated a waiver of Kloss' "right of access to this State's courts, her right to a jury trial, her right to reasonable discovery, her right to findings of fact based on the evidence, and her right to enforce the law applicable to her case by way of appeal." (Pet. App. at App.14.) The Court relied on the fact that Husted "did not explain the arbitration provision (a provision by which Kloss waived at least two constitutional rights, i.e., a right of access to the courts pursuant to Article II, Section 16, and her right to a jury trial pursuant to Article II, Section 26 of the Montana Constitution) to Kloss" and concluded that absent an oral explanation, the clause could not be within Kloss' reasonable expectations. (Pet. App. at App.14.)

The oral notice requirement imposed by the decision below resurrects the same state policy embraced by the Montana statute at issue in *Doctor's Associates*, 517 U.S. at 685. In enacting that statute, the Montana Legislature determined that because arbitration agreements would preclude parties from resolving their disputes in Montana courts, all contracts containing arbitration provisions had to include a notice typed in underlined capital letters on the first page of the contract so that such agreements would be entered into knowingly. *Id.* In this case, by utilizing its common law, the Montana Supreme Court determined that because the arbitration provision included a waiver of access to Montana courts and their procedures, Petitioners must orally explain the arbitration provision before the court will enforce it. (Pet. App. at App.14, App.18.)

The only real difference between the policy put in place by the Legislature and that of the Montana Supreme Court is that the oral notice requirement imposed by the Court is even more arduous. This Court struck down the Montana statute because it applied only to contracts containing arbitration agreements and not to *any* contract. *Doctor's Assoc.*, 517 U.S. at 687. This Court should likewise strike the decision below because its analysis singles out arbitration agreements solely due to the parties' waiver of state constitutional rights of access to the courts and trial by jury. If allowed to stand, this decision will set precedent for the imposition of stricter enforcement standards on arbitration agreements by packaging them in the context of common law contract defenses such as unconscionability. Clearly, such practice will eviscerate the effectiveness of the prohibition of statutorily imposed requirements. Such policy is contrary to Congress' intent

of equal enforcement of arbitration agreements and contracts generally.

II. THIS COURT'S DECISION IN *GREEN TREE FINANCIAL CORP. v. BAZZLE* WILL LIKELY INVOLVE ISSUES PERTINENT TO THE DECISION BELOW.

This Court's decision in *Green Tree Financial Corp. v. Bazzle*, No. 02-634 (cert. granted January 10, 2003), will likely resolve issues directly impacting the decision below. Therefore, if the Court is not inclined to grant the petition, it should at least hold the petition until resolution of *Bazzle*. Respondent argues that *Bazzle* presents a different issue because it involves class actions in arbitration while this case does not. (Resp't Opp'n Br. at 14-15.) Respondent uses a superficial classification for *Bazzle* in an attempt to avoid the true issues presented in that case. Under this superficial reasoning, however, Respondent's reliance on *Ting v. AT&T*, No. 02-15416, 2003 US App. LEXIS 2395 (9th Cir. Feb. 11, 2003), is also misplaced because *Ting* involves class action issues.

The connection between *Bazzle* and the decision below comes not from the style of the case but from the fundamental basis for the holdings in each case. In each case, the court demonstrated its unwillingness to enforce the parties' arbitration agreements as written and instead substituted its own notions of fairness. In *Bazzle*, the South Carolina Supreme Court altered the parties' arbitration agreement and required class arbitration because otherwise the parties would have waived the right to utilize class mechanisms available in court. In this case, the Montana Supreme Court refused to enforce the arbitration agreement altogether because it determined that

Respondent had not knowingly waived the right to resolve her dispute in court with all of its procedural protections. The fact that parties waive the right to certain procedures available in court in arbitration agreements provides the underlying basis for the holdings in both *Bazzle* and the decision below. Thus, this Court will likely decide issues determinative of the decision below in its decision in *Bazzle*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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